



1992

## Gentile v. State Bar of Nevada: Trial in the Court of Public Opinion and Coping with Model Rule 3.6 - Where Do We Go from Here

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### Recommended Citation

Lynn S. Fulstone, *Gentile v. State Bar of Nevada: Trial in the Court of Public Opinion and Coping with Model Rule 3.6 - Where Do We Go from Here*, 37 Vill. L. Rev. 619 (1992).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol37/iss3/4>

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1992]

## Notes

### *GENTILE v. STATE BAR OF NEVADA: TRIAL IN THE "COURT OF PUBLIC OPINION" AND COPING WITH MODEL RULE 3.6—WHERE DO WE GO FROM HERE?*

#### I. INTRODUCTION

Eight years after the American Bar Association (ABA) adopted the Model Rules of Professional Conduct,<sup>1</sup> lawyers and courts continue to struggle with the scope of restraint on lawyers' speech as governed by the ABA's Model Rule 3.6.<sup>2</sup> The struggle continues despite the United

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1. 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § 201, at lxxv (2d ed. 1990) (Model Rules of Professional Conduct adopted by the American Bar Association in 1983). For a discussion of the historical development of the Model Rules of Professional Conduct, see *infra* notes 28-55 and accompanying text.

2. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1983). Rule 3.6 provides:

(a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

(b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(1) The character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(619)

States Supreme Court's recent review of an alleged Rule 3.6 violation in *Gentile v. State Bar of Nevada*.<sup>3</sup> The difficulty in circumscribing extrajudicial speech of attorneys results from the confrontation of two constitutional guarantees—the First Amendment right to freedom of speech and the Sixth Amendment right to a fair trial by an impartial jury.<sup>4</sup> These two constitutional provisions come into direct conflict under Model Rule 3.6, which prohibits certain speech by attorneys when such speech presents a “substantial likelihood of materially prejudicing an adjudicative proceeding.”<sup>5</sup>

Thirty-one states, in addition to Nevada, have adopted the ABA's

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(c) Notwithstanding paragraphs (a) and (b)(1-5), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

- (1) the general nature of the claim or defense;
- (2) the information contained in a public record;
- (3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;
- (4) the scheduling or result of any step in litigation;
- (5) a request for assistance in obtaining evidence and information necessary thereto;
- (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
- (7) in a criminal case:
  - (i) the identity, residence, occupation and family status of the accused;
  - (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
  - (iii) the fact, time and place of arrest; and
  - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

*Id.*

3. 111 S. Ct. 2720 (1991).

4. Irving R. Kaufman, *Report of the Committee on the Operation of the Jury System on "Free Press-Fair Trial" Issue*, 45 F.R.D. 391, 393 (1968) (research report by Judicial Conference of the United States to promulgate guidelines for corrective action to protect juries from prejudicial publicity as result of Supreme Court's decision in *Sheppard v. Maxwell*, 384 U.S. 333 (1966)). The First Amendment to the United States Constitution provides in pertinent part: “Congress shall make no law . . . abridging the freedom of speech, or of the press . . .” U.S. CONST. amend. I. The Sixth Amendment to the United States Constitution provides in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .” U.S. CONST. amend. VI. For historical commentary in this area, see *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 547-62 (1976) (discussing history of the struggle between First and Sixth Amendments commencing with trial of Aaron Burr in 1807) and *Sheppard v. Maxwell*, 384 U.S. 333, 350-53 (1966) (providing impetus for development of professional rules governing extrajudicial speech of attorneys).

5. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1983). “Substantial likelihood of materially prejudicing an adjudicative proceeding” is contained in

Model Rule 3.6, either verbatim or with insignificant variation.<sup>6</sup> *Gentile* is the first case in which the United States Supreme Court has reviewed the constitutionality of professional regulations governing an attorney's extrajudicial speech.<sup>7</sup> In *Gentile*, the State Bar of Nevada charged Mr. Dominic Gentile, an experienced, well-respected criminal defense attorney, with violating Nevada Supreme Court Rule 177—a rule identical to Model Rule 3.6.<sup>8</sup> The State Bar of Nevada contended that Mr. Gentile breached his ethical obligation under Rule 177 because of certain pre-trial statements made to the press.<sup>9</sup> The Supreme Court of Nevada affirmed the state bar's decision.<sup>10</sup>

The United States Supreme Court, however, held that Nevada's application of Rule 177 was void for vagueness.<sup>11</sup> Chief Justice Rehnquist, writing for Justices White, O'Connor, Scalia and Souter, went beyond this narrow holding to discuss the First Amendment implications of Rule 177. Chief Justice Rehnquist stated in dicta that the "substantial likeli-

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section 1 of Nevada's Rule 177 and the analogous section (a) in the ABA's Rule 3.6. For the complete text of Rule 3.6, see *supra* note 2.

6. *Gentile*, 111 S. Ct. at 2741.

7. See Joel H. Swift, *Model Rule 3.6: An Unconstitutional Regulation of Defense Attorney Trial Publicity*, 64 B.U. L. Rev. 1003, 1025 (1984). In 1984, Professor Swift stated: "[T]he Supreme Court has not had occasion to review the constitutional validity of professional regulations restricting trial publicity. . . ." *Id.* Since 1984, the Supreme Court has reviewed only two cases involving First Amendment constitutionality and access to pretrial information. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984) (holding that protective order preventing media abuse of information obtained through pretrial discovery was justified); *Press-Enterprise Co. v. Superior Court of California*, 478 U.S. 1, 2, 13-14 (1986) (holding that right of access to information in preliminary hearing of criminal proceeding depended on "substantial probability" that access would deprive defendant of fair trial). Neither case involved professional rules governing extrajudicial speech of attorneys.

8. See *Gentile v. State Bar of Nevada*, 787 P.2d 386 (Nev. 1990) (Rule 177 identical to ABA Model Rule 3.6 except for numbering of sections and subsections), *cert. granted*, 111 S. Ct. 669, *rev'd*, 111 S. Ct. 2720 (1991); see also NEV. REV. STAT. ANN. Sup. Ct. Rule 177 (Michie 1991). For the complete text of Rule 3.6, see *supra* note 2.

9. *Gentile*, 787 P.2d at 387. For the complete text of Mr. Gentile's opening remarks at the pretrial press conference, see *infra* note 112.

10. *Id.* For the Supreme Court of Nevada's decision, see *infra* notes 122-23.

11. *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2731 (1991). The Supreme Court's multi-part, triple-authored, five-four reversal of Nevada's decision is confusing. Justice Kennedy announced the holding of the Court and delivered the opinion of the Court with respect to Parts III and VI. *Id.* at 2731-32, 2736. He also wrote a minority opinion with respect to Parts I, II, IV and V in which Justices Marshall, Blackmun and Stevens joined. *Id.* at 2723.

Chief Justice Rehnquist delivered the opinion of the Court with respect to Parts I and II, and authored a dissenting opinion with respect to Part III, in which Justices White, Scalia and Souter joined. *Id.*

Justice O'Connor, in a concurring opinion, joined Parts I and II of Chief Justice Rehnquist's opinion, but believed that Nevada's rule was void for vagueness for the reasons set out in Part III of Justice Kennedy's opinion; accordingly, she joined Parts III and VI. *Id.*

hood of material prejudice" standard used in Rule 3.6 to restrain attorneys' speech is constitutional because it is sufficiently narrowly tailored to achieve the compelling state objective of preventing prejudice to an adjudicative proceeding.<sup>12</sup> The *Gentile* opinion, lacking consensus in both the holding and the dicta, leaves attorneys to speculate as to what may or may not be said in the "court of public opinion."<sup>13</sup>

This Note will first present a brief history of the professional rules and the First Amendment standards pertaining to trial publicity.<sup>14</sup> The *Gentile* opinion will then be explained.<sup>15</sup> A discussion of the void for vagueness holding,<sup>16</sup> and the dicta relating to the "substantial likelihood of material prejudice" standard,<sup>17</sup> will be used as a springboard for the author's proposal of a revised Model Rule 3.6.<sup>18</sup> The Rule will be revised by restructuring grammar and adding two new "safe harbor" provisions.<sup>19</sup> Comments are included to clarify the text of the revised rule.<sup>20</sup> The proposed rule employs a "balancing approach," in conjunction with a high level of scrutiny, to determine whether extrajudicial speech by an attorney has a "substantial likelihood of materially prejudicing an adjudicative proceeding."<sup>21</sup>

## II. BACKGROUND

Since the 1800s, "American legal history [has been] studded with notorious examples of the impact of widespread and uncontrolled inflammatory publicity upon the administration of criminal justice."<sup>22</sup>

12. *Id.* at 2745 (Rehnquist, C.J., dissenting).

13. *Id.* at 2729 (Kennedy, J.), 2744 (Rehnquist, C.J., dissenting), 2748 (O'Connor, J., concurring). For example, Justice Kennedy noted that "[a] defense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried." *Id.* at 2729. Chief Justice Rehnquist, on the other hand, opined that prior Supreme Court cases "plainly indicate[d] that the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press." *Id.* at 2744 (Rehnquist, C.J., dissenting).

14. See *infra* notes 28-103 and accompanying text.

15. See *infra* notes 104-70 and accompanying text.

16. See *Gentile*, 111 S. Ct. at 2731-32 (void for vagueness holding).

17. See *id.* at 2745 (Rehnquist, C.J., dissenting) ("substantial likelihood of material prejudice" dicta). "[S]ubstantial likelihood of material prejudice" is the standard used in Model Rule 3.6. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1983). For the complete text of Rule 3.6, see *supra* note 2.

18. See *infra* notes 171-219 and accompanying text.

19. See *infra* notes 183-211 and accompanying text.

20. See text following note 182 and note 216.

21. See *infra* notes 217-19 and accompanying text.

22. Kaufman, *supra* note 4, at 394-95. The Committee on the Operation of the Jury System made three recommendations:

First, . . . each United States District Court has the power and the duty to control the release of prejudicial information by attorneys who are members of the bar of that court, and [the Committee] recommends

Such publicity can become so prejudicial that it denies individuals their constitutional right to a fair trial by an impartial jury.<sup>23</sup> Difficulties ensue when the courts or state legislatures try to protect the right to a fair trial because such regulations or restraints often trammel on the First Amendment rights of freedom of speech and freedom of the press.<sup>24</sup> In *Mares v. United States*,<sup>25</sup> the Court of Appeals for the Tenth Circuit articulated the quandary that this situation presents:

The problem presented is incapable of a satisfactory solution. Media of publicity have a right to report what happens. . . . An accused has a right to a trial by an impartial jury on evidence which is legally admissible. The public has a right to demand and expect "fair trials designed to end in just judgments." These rights must be accommodated in the best possible manner.<sup>26</sup>

Model Rule 3.6 seeks to accommodate the struggle between these conflicting constitutional rights.<sup>27</sup> A brief chronology of the development of the law and professional rules governing attorneys' extrajudicial

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action by local rule to restrict the release of such information on penalty of disciplinary action. Second, the Committee believes that the court has a similar power and duty to prohibit prejudicial disclosures by courthouse personnel . . . [and] recommends that each District Court act by local rule to forbid such disclosure. Finally, it is clear that the court has the power and the duty to regulate the conduct of a trial so as to insulate the proceedings from prejudicial influences.

*Id.* at 401.

23. For the text of the Sixth Amendment provision guaranteeing a fair trial by an impartial jury, see *supra* note 4. The Supreme Court has reversed a number of convictions where trial conditions were saturated with prejudicial publicity. Kaufman, *supra* note 4, at 395; see, e.g., *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966) (reversing denial of habeas petition because trial judge did not protect accused from inherently prejudicial publicity saturating community); *Estes v. Texas*, 381 U.S. 532, 536-52 (1965) (holding televising of criminal proceeding inherently prejudicial and denial of due process); *Rideau v. Louisiana*, 373 U.S. 723, 724-27 (1963) (holding state court's denial of change of venue after accused's confession repeatedly televised was denial of fair trial and due process); *Irvin v. Dowd*, 366 U.S. 717, 725, 727-28 (1961) (holding death sentence void and in violation of Constitution because of overwhelming community prejudice resulting from pretrial radio, newspaper and television publicity).

24. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 556-61, 570 (1976) (refusing to impose prior restraints on press regarding coverage of murder trial and affirming constitutional guarantee of freedom of speech). For the relevant text of the First Amendment guarantees of freedom of speech and press, see *supra* note 4.

25. 383 F.2d 805 (10th Cir. 1967), *appeal after remand*, 409 F.2d 1083 (10th Cir. 1968), *cert. denied*, 394 U.S. 963 (1969). In *Mares*, during a trial for armed robbery charges, published newspaper accounts reported information about the defendants' prior admissions of guilt which had been ruled inadmissible at trial. *Id.* at 807. A new trial was ordered because the trial judge failed to poll the nonsequestered jury about exposure to the newspaper articles. *Id.* at 805.

26. *Id.* at 808 (footnotes omitted).

27. For the language of Model Rule 3.6, see *supra* note 2.

speech is presented below to frame the current status of the law and lay the groundwork for an analysis of the *Gentile* opinion.

A. *Historical Development of the Rules of Professional Conduct*

The Model Rules are an outgrowth of a tenet of American jurisprudence which maintains that a court can control the professional life of a lawyer.<sup>28</sup> This tenet is often relied upon by American courts in the assertion and exercise of their authority to discipline and disbar lawyers whose conduct departs from prescribed standards.<sup>29</sup> In 1917, Judge Cardozo articulated this principle, when he stated that “[m]embership in the bar is a privilege burdened with conditions.”<sup>30</sup> These “conditions” ultimately became embodied as prescribed standards for lawyers’ conduct in the codes of professional ethics that evolved in the United States.<sup>31</sup>

The Alabama State Bar Association promulgated and adopted the first code of professional ethics in the United States in 1887.<sup>32</sup> Building on the Alabama code, the ABA formulated the “Canons of Professional Ethics” in 1908 and encouraged bar associations throughout the country to adopt them as binding on their membership.<sup>33</sup> Canon 20 warned

28. *Theard v. United States*, 354 U.S. 280, 281 (1957) (disbarment proceeding iterating philosophy that lawyers as “officers of the court” are subject to court’s control).

29. *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2740 (1991).

30. *In re Rouss*, 116 N.E. 782, 783, 786-87 (N.Y. 1917), *cert. denied*, 246 U.S. 661 (1918) (affirming order of disbarment against attorney charged with collecting bribes and holding that attorney in disciplinary proceedings could not claim immunity on ground of self incrimination within meaning of penal statute).

31. HAZARD & HODES, *supra* note 1, § 201, at lxv. Throughout the nineteenth century, lawyers’ conduct was governed by fragmentary common law and compilations of unofficial advisory legal ethics. *Id.* The most famous of the early compilations was David Hoffman’s *Fifty Resolutions in Regard to Professional Deportment*, issued in 1836. *Id.*

32. HENRY S. DRINKER, *LEGAL ETHICS* 23 (1953). Colorado, Georgia, Kentucky, Maryland, Michigan, Missouri, North Carolina, Virginia, West Virginia and Wisconsin adopted Alabama’s Code, with minor changes, between 1887 and 1906. *Id.* During the same time California, Oregon and Washington adopted “duties” of an attorney taken from the oath for advocates prescribed by the laws of the Swiss Canton of Geneva. *Id.* The 1899 charter of the State Bar Association of Louisiana contained a Code of Ethics similar to the Alabama Code. *Id.* The Bar Association of Jacksonville, Florida, adopted similar measures by printing “Resolutions in Regard to Professional Deportment” in its 1906 Yearbook. *Id.* By 1908, Idaho, Indiana, Iowa, Minnesota, Mississippi, Nebraska, Oklahoma, South Dakota and Utah developed Codes of Ethics resulting from codification of statutory enactments or action of the bar associations. *Id.* Between 1905 and 1908, the bar associations of Illinois, Kansas, Massachusetts, Montana, New York, Ohio, Pennsylvania and Vermont had charged committees with working on canons and conferring with the American Bar Association Committee. *Id.* at 23-24.

33. See HAZARD & HODES, *supra* note 1, § 201, at lxv. The original Canons omitted more recent topics, such as conflicts of interest, and spoke only of others in generalities. *Id.* at lxv, lxvi. Out of necessity, the decisional law and

lawyers against interfering with a pending trial by stating that “[n]ewspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial . . . and otherwise prejudice the due administration of justice. Generally they are to be condemned.”<sup>34</sup> The Canons remained in effect as the ABA’s authoritative source of professional ethics for attorneys until 1964.<sup>35</sup>

Between 1964 and 1966, various groups and agencies, responding to an increasing concern over prejudicial trial publicity, began proposing measures designed to cope with the problem.<sup>36</sup> In June 1966, the

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bar association ethics opinions grew to fill in these “gaps.” *Id.* at lxv. The 1908 Canons had quasi-authoritative legal status. *Id.* Because the courts and disciplinary authorities often referred to the Canons as the basis of a decision, they became incorporated into a “common law” of professional ethics in the 1930s. *Id.*

34. *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2740 (1991) (quoting Canon 20). In the years following the advent of Canon 20, the Supreme Court grappled with the effects of publicity on a defendant’s right to an impartial trial. Kaufman, *supra* note 4, at 395 (citing *Marshall v. United States*, 360 U.S. 310, 311-13 (1959) (juror exposure to inadmissible newspaper accounts of prior conviction held prejudicial and entitled defendant to new trial)); *see also* *Estes v. Texas*, 381 U.S. 532, 536-52 (1965) (televising of highly sensational criminal proceeding held to be inherently prejudicial and denial of due process); *Rideau v. Louisiana*, 373 U.S. 723, 724-27 (1963) (holding that interview in which defendant confessed to crime which had been televised repeatedly in area from which jurors were drawn when judge denied change of venue constituted denial of fair trial and due process); *Irvin v. Dowd*, 366 U.S. 717 (1961) (vacating judgment for death sentence because state court judge denied three motions for change of venue and eight motions for continuance, failing to ensure impartial jury in the face of pervasive, inflammatory and prejudicial publicity).

These decisions provided impetus for the Court to require more stringent regulation of attorneys and other individuals within a court’s jurisdiction. For the Court’s mandate regarding prejudicial publicity, *see infra* note 38 and accompanying text.

35. In 1964, the ABA appointed a committee to revise the Canons. HAZARD & HODES, *supra* note 1, § 201, at lxvi. The Wright Committee, named after its chairman, Edward L. Wright, developed the Model Code of Professional Responsibility, which the ABA adopted in 1969. *Id.* The courts and bar associations in virtually all jurisdictions in the United States adopted the Model Code within a few years after its promulgation in 1970. *Id.*

36. *See* Kaufman, *supra* note 4, at 398. The events surrounding the assassination of President Kennedy led the Warren Commission in 1964 to recommend that

the representatives of the bar, law enforcement associations, and the news media work together to establish ethical standards concerning the collection and presentation of information to the public so that there will be no interference with pending criminal investigations, court proceedings, or the right of individuals to a fair trial.

Robert A. Ainsworth, “*Fair Trial-Free Press*,” 45 F.R.D. 417 (1968) (quoting Warren Commission Report on assassination of President Kennedy in address before Eighth Circuit Judicial Conference discussing fair trial-free press issue).

The Warren Commission Report was in part responsible for the creation by the ABA of the Advisory Committee on Fair Trial and Free Press in 1964, now known as the Reardon Committee. *Id.* The committee’s chairman was Justice Paul Reardon of the Massachusetts Supreme Court. *Id.* In light of the Supreme



United States Supreme Court in *Sheppard v. Maxwell*<sup>37</sup> laid down a mandate for courts to control prosecutors, defense counsel and the prejudicial impact of publicity on the jury system.<sup>38</sup> The *Sheppard* Court condemned the unfair and prejudicial publicity Dr. Sheppard received during the course of an investigation and trial for murder.<sup>39</sup> The

Court's decision in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), and based on initial results obtained from a twenty-month study, the Reardon Committee made specific recommendations on how to control the impact of publicity on the administration of criminal justice. *Id.* at 418-19. In a compilation of cases between January 1963 and March 1965, the Reardon Report found that there were approximately 100 reported decisions in which the defendant claimed that prejudicial publicity prevented obtaining a fair trial. *Id.* at 419. The Reardon Committee also felt that these cases were just "the tip of the iceberg," and that the actual number of cases involving prejudice was undoubtedly much larger. *Id.*

The Reardon Committee recommended court control of prejudicial trial publicity in three areas: control of attorneys by local rule, control of courthouse personnel by local rule, and control of conduct during trial to insulate proceedings from prejudicial influences. *Id.* at 424. Furthermore, the Reardon Report implied that courts could place restrictions on the press. *Id.* at 420-23; cf. Kaufman, *supra* note 4, at 401. The Judicial Conference of the United States adopted the same three recommendations but declined to adopt a direct "curb or restraint" on publication by the press. *Id.*

Following the release of the Reardon Report in 1966, a number of legal and media organizations studied and released reports regarding the issue of fair trial and free press. *Id.* at 397. The American Newspaper Publishers Association released its report and recommendations in January 1967. *Id.* at 397 n.6. Shortly thereafter in 1967, the Medina Committee of the Association of the Bar of the City of New York issued its final report entitled "Freedom of the Press and Fair Trial." *Id.* at 397 n.7.

The Medina Committee was a committee of the Association of the Bar of the City of New York, chaired by Senior Judge Harold R. Medina of the United States Court of Appeals for the Second Circuit. *Id.* Originally organized in 1963, the committee issued in 1965 its interim report, "Radio, Television and the Administration of Justice: A Documented Survey of Materials." *Id.* For a discussion of other committees and reports proposing recommendations regarding trial publicity, see Swift, *supra* note 7, at 1020-21, 1031-44.

37. 384 U.S. 333 (1966).

38. See Kaufman, *supra* note 4, at 395. The Court in *Sheppard* directed that "courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences." *Id.* at 396-97 (quoting *Sheppard*, 384 U.S. at 363 (emphasis added)). Furthermore, the Court admonished prosecutors, defense counsel, the accused, witnesses, court staff and enforcement officers who were under the jurisdiction of the court from frustrating the fair administration of justice. *Id.*

39. *Sheppard*, 384 U.S. at 352-63. Marilyn Sheppard, Dr. Sheppard's pregnant wife, was bludgeoned to death in their lakeshore home in Bay Village, Ohio, a suburb of Cleveland. *Id.* at 335-36. On the day of the tragedy, Dr. Sheppard reported that he had fallen asleep on the couch after dinner and had awakened to a cry from his wife in the early morning hours. *Id.* at 336. He hurried upstairs and saw a "form" standing next to his wife's bed. *Id.* Sheppard struggled with the "form," was struck on the back of the neck and rendered unconscious. *Id.* When he regained consciousness, Sheppard found himself on the floor next to his wife's bed. *Id.* He rose, looked at his wife, took her pulse and believed that "she was gone." *Id.* Sheppard then went to his son's room and found him unmolested. *Id.* Hearing a noise, he went downstairs to find the

Supreme Court in *Sheppard*, noting the prevalence of unfair and prejudicial news commentary on pending trials, concluded:

"form" running out the door. *Id.* He pursued it, grappled with it on the beach and again lost consciousness. *Id.* When Sheppard recovered, he returned home and called his neighbor, Mayor Houk of Bay Village. *Id.* Both the Mayor and his wife came over immediately and found Dr. Sheppard slumped in a chair. *Id.* When they asked "What happened?" Sheppard replied, "I don't know, but someone ought to try to do something for Marilyn." *Id.*

From the outset of the investigation, local officials and the media focused suspicion on Dr. Sheppard. *Id.* at 337. The Coroner, Dr. Gerber, was reported to have told his men after a search of the house and premises on the morning of the tragedy, "Well, it is evident the doctor did this, so let's go get the confession out of him." *Id.* The Coroner then proceeded to examine and interrogate Dr. Sheppard while Sheppard was under sedation in a hospital room. *Id.* Sheppard was told by a police officer that lie detector tests were "infallible" so "you might as well tell us all about it now." *Id.* at 337-38. At the end of the interrogation the same officer told Sheppard: "I think you killed your wife." *Id.* at 338. Sheppard made himself available for frequent and extended questioning without the presence of an attorney until the time he was subpoenaed at the Coroner's inquest. *Id.*

The Cleveland news media "saturated the area where the trial was to be held with highly inflammatory news stories and editorials about the defendant and the trial." Kaufman, *supra* note 4, at 396. In a newspaper story on the day of Marilyn Sheppard's funeral, the Assistant County Attorney, later the chief prosecutor of Sheppard, vehemently criticized Sheppard's family for not permitting immediate questioning. *Sheppard*, 384 U.S. at 338. After this criticism, headlines repeatedly stressed Sheppard's lack of cooperation with the police and other officials. *Id.* at 338-39.

At the request of the Coroner, Sheppard reenacted the alleged murder in his home in the presence of the Coroner, police and a group of newsmen apparently invited by the Coroner. *Id.* at 338. Front page headlines emphasized Sheppard's refusal to take a lie detector test; other stories talked of Sheppard's refusal to be injected with "truth serum." *Id.* at 339. On July 20, an editorial on the front page stated that somebody is "getting away with murder." *Id.* On July 21, another front page editorial was entitled "Why No Inquest? Do It Now, Dr. Gerber." *Id.* The same day the Coroner called an inquest and subpoenaed Dr. Sheppard. *Id.*

The inquest was held the following day in a school gym in front of a long table occupied by reporters, television and radio personnel and broadcasting equipment. *Id.* Sheppard was brought into the gym by the police, who searched him in full view of several hundred spectators. *Id.* Sheppard's counsel were present for the three-day inquest, but were not allowed to participate. *Id.*

Newspaper stories disclosed information as fact that was never admitted into evidence at trial. *Id.* at 340. In a story on July 26, a detective was quoted as saying that scientific tests at the Sheppard home had definitely established that the killer washed off a trail of blood from the murder bedroom to the downstairs, thereby casting doubt on Sheppard's account of the murder. *Id.* at 340. This evidence was never produced at trial. *Id.* The newspapers also delved into Sheppard's personal life, elaborating on an extramarital affair Sheppard had with Susan Hayes as the motive for the crime. *Id.* This extramarital relationship was dissected and enlarged, portraying Sheppard as an infidel involved with many women. *Id.* The testimony at trial showed that the only illicit relationship Sheppard had had was with Susan Hayes. *Id.* at 340-41.

The intensity of the publicity continued unabated in the courtroom itself, and, despite motions by defense counsel for change of venue, continuance and mistrial, no action was taken by the state court. *Id.* at 348. A long temporary

Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.<sup>40</sup>

This mandate of the Supreme Court in *Sheppard* provided the impetus for "one of the most searching debates in recent legal history as to methods of solving the problems of fair trial and free press."<sup>41</sup>

In 1968, the Committee on the Operation of the Jury System,<sup>42</sup> responding to the Supreme Court's decision in *Sheppard*, took stock of all the available information on the "Free Press-Fair Trial Issue" and reported its recommendations to the Chief Justice of the United States.<sup>43</sup> The Committee proposed that, in the interest of establishing a uniform standard of conduct for attorneys in criminal cases in both state and federal courts, Canon 20 should be replaced with the formulation in the

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table running the width of the courtroom was set up inside the bar less than three feet from the jury box. *Id.* at 342-43. Approximately 20 representatives of newspapers and wire services were assigned seats at this table by the court. *Id.* at 343. The first four rows of benches were assigned to the press, with only the last row reserved for the Sheppard family. *Id.* Representatives of the news media used all the room on the courtroom floor for private lines and telegraphic equipment to expedite reporting of the trial. *Id.* Broadcasting facilities were set up on the third floor of the courthouse next door to the jury room. *Id.* Television and newsreel cameras took pictures of the trial participants on the steps in front of the courthouse. *Id.* Prospective jurors were photographed during jury selection, and after the trial opened, witnesses, counsel and jurors were photographed and televised whenever they left the courtroom. *Id.* at 343-44. All of this continued during the nine weeks of the trial. *Id.* at 344.

The courtroom was so crowded with representatives of the news media, causing noise and confusion, that a loud speaker had to be installed to hear the witnesses and counsel. *Id.* The reporters who were clustered inside the bar made it impossible for Dr. Sheppard and his counsel to speak confidentially during the proceedings. *Id.* It was often necessary to adjourn into the judge's chambers to have privacy or to raise a point out of the hearing of the jury and reporters. *Id.* Even then, the news media representatives packed the judge's anteroom so that counsel could hardly return to the courtroom. *Id.*

Dr. Sheppard was convicted of murder. He then petitioned on writ of habeas corpus to the United States Supreme Court. *Id.* at 335. The writ was issued, a new trial was ordered, and Dr. Sheppard was ultimately acquitted. Ainsworth, *supra* note 36, at 419 (address before Eighth Circuit Judicial Conference discussing fair trial-free press issue).

40. *Sheppard*, 384 U.S. at 362.

41. Kaufman, *supra* note 4, at 397.

42. The Committee on the Operation of the Jury System was a committee of the Judicial Conference of the United States and was reactivated on September 12, 1966 to study the need for promulgating guidelines or taking other corrective actions to shield federal juries from prejudicial publicity in light of the Supreme Court's decision in *Sheppard*. Kaufman, *supra* note 4, at 391-92.

43. For a complete discussion of the Committee's recommendations, see generally *id.* See also Ainsworth, *supra* note 36.

ABA's Code of Professional Responsibility.<sup>44</sup> Disciplinary Rule 7-107 (DR 7-107) was promulgated on this recommendation.<sup>45</sup>

DR 7-107 delineated prohibited and permissible extrajudicial statements for different stages of civil and criminal proceedings.<sup>46</sup> Many courts found DR 7-107 constitutionally overbroad.<sup>47</sup> The Code's structure itself, attempting to differentiate legal standards from guidelines, created practical problems in interpretation.<sup>48</sup> Additional confusion resulted from the fact that the Code did not address certain important professional issues.<sup>49</sup> Finally, other Code provisions, in particular those concerning advertising, were held to be unconstitutional as inconsistent with the First Amendment.<sup>50</sup>

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44. See Kaufman, *supra* note 4, at 407. The Judicial Conference Committee's recommendations incorporated the results from both the Medina and Reardon Reports and contemplated "an absolute prohibition of extrajudicial disclosure by attorneys of prior criminal records, confessions, tests, witnesses, opinions as to the guilt or innocence of the accused, the merits of the case or the evidence involved, as well as other described matters potentially prejudicial in nature." *Id.*

Concomitantly with the activities of the Judicial Conference Committee, in 1964 the ABA appointed a committee to revise the Canons. For a brief discussion of this committee, see *supra* note 35 and accompanying text.

45. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1980). DR 7-107 sets forth, in parts (A) and (B), lists of prohibited and permissible extrajudicial speech similar to Model Rule 3.6. For the text of Model Rule 3.6, see *supra* note 2. DR 7-107 has eight additional parts, with more lists applying to different stages of criminal trials, civil actions and administrative proceedings. The rule required careful reading to comprehend which lists applied under which circumstances. For a discussion of the nature of this rule, see *infra* notes 46-49.

46. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1980). The Code of Professional Responsibility had a tri-partite structure: broad general 'axiomatic' principles ('Canons'), aspirational and explanatory provisions ('Ethical Considerations' or 'ECs'), and black letter rules ('Disciplinary Rules' or 'DRs'). HAZARD & HODES, *supra* note 1, § 201, at lxvi. In theory, the DRs were minimum legal standards, while the Canons and ECs were guidelines. In practice, however, it was impossible to maintain this separation, and the Canons and ECs were often given the same binding effect as the DRs. *Id.*

47. See HAZARD & HODES, *supra* note 1, at § 3.6:102, 665. Practically every court that considered challenges to DR 7-107 said the rule was overbroad. *Id.* (citing *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975)); see also Joseph T. Rotondo, Note, *A Constitutional Assessment of Court Rules Restricting Lawyer Comment on Pending Litigation*, 65 CORNELL L. REV. 1106, 1107-11 (1980). For a discussion of the overbreadth doctrine, see *infra* note 54.

48. See HAZARD & HODES, *supra* note 1, § 201, at lxvi (discussing tri-partite structure of the Code).

49. *Id.* The original Code of Professional Responsibility did not address conflicts of interest regarding former clients. *Id.* The Code also did not account for problems in nonlitigation situations. *Id.* Furthermore, the Code ignored issues attendant with the practice of law in complex organizations by giving no guidance regarding "entities" as clients. *Id.*

50. *Id.* at lxvi-ii; see also *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 655-56 (1985) (reversing attorney reprimand under DR 2-101 for soliciting women who used Dalkon Shield to join class action); *Bates v. State Bar of Ari-*

Reacting to difficulties with interpretation of the Code of Professional Responsibility in 1977 and constitutional challenges to the validity of its provisions, the ABA appointed a Special Commission on Evaluation of Professional Standards.<sup>51</sup> This Special Commission was formed to recommend whether the Code should be revised or replaced.<sup>52</sup> A lengthy and controversial drafting process, which commenced in 1977, culminated in the ABA's adoption of the Model Rules of Professional Conduct at the August 1983 Annual Meeting.<sup>53</sup> ABA Model Rule of Professional Conduct 3.6 modified the language and format of DR 7-107 in an attempt to address constitutional problems of vagueness and overbreadth.<sup>54</sup> As of June 1991, thirty-one states in addition to Nevada had adopted, either verbatim or with insignificant changes, Rule 3.6.<sup>55</sup>

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zona, 433 U.S. 350 (1977) (holding that state's application of ABA Model Code of Professional Responsibility DR 2-101 violated First Amendment). For an overview of Supreme Court decisions dealing with First Amendment rights of lawyers to advertise, see STEVEN GILLERS & NORMAN DORSEN, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 35-61 (2d ed. 1989).

51. HAZARD & HODES, *supra* note 1, at lxvii. This special commission was known as the Kutak Commission, named after its chairman, Robert J. Kutak. *Id.*

52. *Id.* The Kutak Commission recommended what would eventually become the "Model Rules of Professional Conduct," a complete revision of the Code in a "restatement" format with black letter rules and comments. *Id.*

53. See ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, *THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES*, Preface, at v (1987).

54. HAZARD & HODES, *supra* note 1, at § 3.6:102, 665. For decisions holding DR 7-107 unconstitutionally overbroad, see *Hirschkop v. Snead*, 594 F.2d 356, 373 (4th Cir. 1979) (holding DR 7-107 unconstitutionally overbroad because it restricted comments by lawyers involved in civil litigation); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th Cir. 1975) (holding DR 7-107 overbroad with respect to "reasonable likelihood" standard, stating proper standard should be "serious and imminent threat" of interference with fair administration of justice), *cert. denied*, 427 U.S. 912 (1976).

Model Rule 3.6 differs substantially from DR 7-107 in four respects: 1) Rule 3.6 uses the "substantial likelihood" standard whereas DR 7-107 uses "reasonable likelihood"; 2) Rule 3.6 contains a scienter element—"the lawyer knows or reasonably should know"; 3) Rule 3.6 requires "material prejudice" whereas DR 7-107 refers to statements which are "reasonably likely to interfere with trial"; and 4) Rule 3.6 does not delineate different phases of criminal investigation and prosecution. Scott M. Matheson, Jr., *The Prosecutor, The Press, and Free Speech*, 58 FORDHAM L. REV. 865, 876 (1990).

Although the drafters changed Model Rule 3.6 in an attempt to rectify the constitutional objections to DR 7-107, the revised language used in Model Rule 3.6 is arguably even more constitutionally objectionable. *Id.* at 875 n.51. See generally Swift, *supra* note 7. The void for vagueness holding in *Gentile* buttresses this contention. For a discussion of the void for vagueness holding in *Gentile*, see *infra* notes 133-50 and accompanying text.

55. *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2741 (1991). Only eleven states had adopted DR 7-107 of the ABA's Code of Professional Responsibility. *Id.*

B. *First Amendment Considerations*1. *Void for Vagueness Doctrine*

The Supreme Court in *Gentile* held that Nevada's application of Rule 177 (ABA Rule 3.6) was void for vagueness.<sup>56</sup> Constitutional due process requires that a legislative enactment be held void for vagueness if "[persons] of common intelligence must necessarily guess at its meaning and differ as to its application."<sup>57</sup> Three important tenets of American jurisprudence form the basis for the void for vagueness doctrine. First, laws must give a person of ordinary intelligence reasonable opportunity to know what is prohibited. Second, laws must be explicit to prevent discriminatory and arbitrary enforcement. Third, a vague law pertaining to First Amendment freedoms unacceptably "chills" the exercise of those freedoms.<sup>58</sup> The void for vagueness doctrine requires that laws must be drafted with sufficient precision to avoid ensnaring the innocent, yet be adequately encompassing to achieve the legislative purpose.<sup>59</sup> Because of the difficulty of this task, the Supreme Court will not ordinarily hold a statute unconstitutional if only some protected speech remains within the scope of prohibition.<sup>60</sup> In general, it is unlikely that the Court will find an enactment void for vagueness, unless the individual challenging the statute is one of the ensnared innocents, and the Court finds that it was practicable for the legislature to have drafted the enactment more precisely.<sup>61</sup>

An enactment may be void for vagueness "on its face" or void for vagueness "as applied."<sup>62</sup> In reviewing vagueness challenges, the Court

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56. *Id.* at 2731.

57. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1929) (holding ambiguous minimum wage statute void for vagueness). See generally Anthony G. Amsterdam, Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

58. *Grayned v. City of Rockford*, 408 U.S. 106, 108-09 (1972) (holding city ordinance prohibiting willful making of noise adjacent to grounds where school in session not unconstitutionally vague or overbroad).

59. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, §§ 12-31, at 1033 (1978).

60. *Id.* at 1034; see also *United States v. National Dairy Prods. Corp.*, 372 U.S. 29, 32 (1963) (statutes are not "invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language").

61. *Id.*

62. See Amsterdam, *supra* note 57, at 109 n.224 (author explains that "on its face" has multiple meanings not necessarily limited to words of statute as written); see also *Smith v. Goguen*, 415 U.S. 566, 576-77 (1974) (statute prohibiting public contemptuous treatment of United States flag held vague as applied without benefit of judicial clarification; "vagueness as applied" and "vagueness on its face" distinguished).

In *Gentile*, Justice Kennedy made a point of describing the Court's holding in terms of Rule 177 being void for vagueness "as applied," expressly stating that the Court was not called upon to determine the constitutionality of the ABA's Model Rule 3.6, but only Nevada's Rule 177 as it has been interpreted and ap-

considers whether the literal scope of the statute had the benefit of judicial interpretation in the state court below.<sup>63</sup> The Court frequently renders state decisions invalid by finding the state enactment void for vagueness "as applied," but leaving the constitutional enforceability of the statute itself unimpaired.<sup>64</sup> This is exactly what the Court did in *Gentile*.<sup>65</sup> This "as applied" mode of judicial review tested the constitutionality of Rule 3.6 only as it applied to the particular set of facts of the *Gentile* case.<sup>66</sup> Unfortunately, this type of case-by-case review and deference to upholding the statute as written will leave the next challenger to the vagaries of state interpretation—dependent on the state's comprehension and application of the Supreme Court's decision.<sup>67</sup>

## 2. *Constitutional Standards Applied to Professional Rules Governing Extrajudicial Speech*

Standards used to determine whether extrajudicial speech by an attorney can be regulated are currently embodied in professional rules governing trial publicity.<sup>68</sup> In addition to the "substantial likelihood of material prejudice" standard presently incorporated into Model Rule 3.6 (and Nevada's Rule 177), the three other commonly applied formulations are "clear and present danger," "serious and imminent threat" and "reasonable likelihood" of prejudice.<sup>69</sup>

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plied by the State of Nevada. *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2723, 2725 (1991). Arguably, a holding of void for vagueness "on its face" would have required that the Court challenge the constitutionality of ABA Model Rule 3.6.

63. *Smith*, 415 U.S. at 573.

64. See *Amsterdam*, *supra* note 57, at 110 & n.226.

65. *Gentile*, 111 S. Ct. at 2731-32.

66. *Id.*; see GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 1124 (2d ed. 1991) (describing "as applied" analysis relating to overbreadth doctrine).

67. STONE, *supra* note 66, at 1124, 1130; see Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 871-75 (1970) (discussing virtual identity of vagueness and overbreadth doctrines as they relate to First Amendment). When a statute is held vague "as applied,"

[the statute] is remitted to a process of hammering out the limits of intervention under the impact of particular fact situations in the expectation that over time a core of definite coverage will take shape by accretion. But a prolonged and costly process of bringing clarity to statutory commands, like the uncertain process of case by case excision, holds preferred freedoms in abeyance for an indefinite period and tolerates the intimidation of protected activity caused by a law whose (literal or permissible) scope is uncertain.

Note, *supra*, at 873-74.

68. See Matheson, *supra* note 54, at 916 (citing commentators and criticism of standards governing extrajudicial speech of attorneys).

69. Brief for the United States as Amicus Curiae at 13-14, *Gentile* (No. 89-1836). For a discussion of "clear and present danger," see *infra* notes 70-83 and accompanying text. For a discussion of "serious and imminent threat," see *infra* notes 84-88 and accompanying text. For a discussion of "reasonable likelihood of prejudice," see *infra* notes 89-93.

## a. Clear and Present Danger

The “clear and present danger” standard has been the traditional test used by the Supreme Court to review the validity of suppressions of speech.<sup>70</sup> Justice Holmes, speaking for the Court in *Schenck v. United States*,<sup>71</sup> discussed whether laws could abridge the freedom of speech protected by the First Amendment. He stated that “[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent.”<sup>72</sup> After *Schenck*, Justice Holmes’ “clear and present danger” test underwent multiple permutations in the Court’s decisions during subsequent years.<sup>73</sup>

In *Bridges v. California*,<sup>74</sup> the Court elaborated on the “clear and present danger” standard, emphasizing that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.<sup>75</sup> The “clear and present danger” standard

70. See generally Frank R. Strong, *Fifty Years of “Clear and Present Danger”*: From *Schenk* to *Brandenburg*—and Beyond, 1969 SUP. CT. REV. 41.

71. 249 U.S. 47 (1919) (using “clear and present danger” standard to hold defendants violated § 3 of Espionage Act of 1917 by circulating documents opposing draft).

72. *Id.* at 52 (emphasis added).

73. See *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (overruling *Whitney v. California* and essentially neutralizing “clear and present danger” test as relates to First Amendment); *Dennis v. United States*, 341 U.S. 494 (1951) (plurality opinion adopting Judge Learned Hand’s formulation “whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger”); *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis/Holmes concurrence stating that there must be reasonable ground to fear serious evil and reasonable ground to believe that danger is imminent with only emergency justifying suppression of speech); *Gitlow v. New York*, 268 U.S. 652 (1925) (majority and dissent citing “clear and present danger” language of *Schenk*); *Abrams v. United States*, 250 U.S. 616 (1919) (Justice Holmes’ dissent warning that only present danger of immediate evil or intent to bring it about warrants Congress limiting expression of opinion).

Professor Thomas Emerson has pointed out that the Supreme Court has failed to develop a comprehensive, coherent theory for First Amendment analysis in part because of the many permutations of the “clear and present danger” test. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 717 (1970).

74. 314 U.S. 252 (1941). In *Bridges*, the Supreme Court overturned a contempt citation based on a union leader’s public release of a telegram threatening a strike if the state court attempted to enforce its decision in a jurisdictional dispute. *Id.* at 271. Applying the “clear and present danger” standard, the Court stated that the substantive “evil” under consideration in determining whether free speech should be restricted was the “disorderly and unfair administration of justice.” *Id.*

In discussing *Bridges*, Professor Tribe noted two points. First, a publication impugning the integrity of a judge or the administration of justice generally imposes no “clear and present danger.” Second, it is assumed that judges will not be swayed in their decisions by public criticism. TRIBE, *supra* note 59, at 623-25.

75. *Bridges*, 314 U.S. at 263; see also *Wood v. Georgia*, 370 U.S. 375, 384 (1962) (evaluating out-of-court statements by sheriff using “clear and present



underwent further metamorphosis in *Landmark Communications, Inc. v. Virginia*.<sup>76</sup> Chief Justice Burger stated that "Mr. Justice Holmes' test was never intended 'to express a technical legal doctrine or to convey a formula for adjudicating cases.'"<sup>77</sup> The "clear and present danger" test requires a court to make its own inquiry into the imminence and magnitude of the danger flowing from the utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression.<sup>78</sup> Alternative means to serve the State's interests should also be weighed.<sup>79</sup>

The "clear and present danger" standard was ultimately applied by the New York Supreme Court to professional rules restricting the extrajudicial speech of attorneys in *Markfield v. Association of the Bar*.<sup>80</sup> In *Markfield*, one of the attorneys in a criminal trial participated in a radioaired panel discussion on prison rebellions while the trial was in progress.<sup>81</sup> The New York Association of the Bar charged the attorney with professional misconduct and with violating DR 7-107.<sup>82</sup> The New York appellate court dismissed the charge of professional misconduct, hold-

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danger" standard); *Craig v. Harney*, 331 U.S. 367, 371-73, 378 (1947) (reversing contempt conviction of publisher, editorial writer and news reporter using "clear and present danger" standard); *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946) (reversing contempt convictions of newspaper publisher and associate editor using "clear and present danger" standard).

76. 435 U.S. 829 (1978). Chief Justice Burger questioned the relevance of the "clear and present danger" standard under the facts of *Landmark*, and refused to accept the Supreme Court of Virginia's mechanical application of the standard. *Id.* at 842. *Landmark* involved a newspaper publisher who allegedly violated a Virginia statute prohibiting the disclosure of information regarding state proceedings investigating judicial misconduct. *Id.* at 831. The Supreme Court found that punishment of third parties to the proceedings for publishing truthful information about the state's activities violated the First Amendment. *Id.* at 837, 845-46.

77. *Id.* at 842 (citing *Pennekamp v. Florida*, 328 U.S. 331, 353 (1946) (Frankfurter, J., concurring)).

78. *Id.* at 842-43.

79. *Id.* at 843.

80. 370 N.Y.S.2d 82, *appeal dismissed*, 337 N.E.2d 612 (N.Y. 1975). After *Schenk*, the Supreme Court of the United States used the "clear and present danger" standard primarily "in reviewing contempt citations against *non-attorneys* for comments or publications relating to pending judicial proceedings." Brief for the United States as Amicus Curiae at 13, *Gentile* (No. 89-1836); see also *Wood v. Georgia*, 370 U.S. 375, 384-85, 395 (1962) (sheriff's statement to press criticizing judge's charge to grand jury investigating racial block voting did not pose "clear and present danger," and use of contempt to punish sheriff abridged right of free speech); *Craig v. Harney*, 331 U.S. 367, 371 (1947) (newspaper's criticism of judge's ruling fell short of meeting "clear and present danger" test); *Bridges v. California*, 314 U.S. 252, 263, 278 (1941) (reversing contempt citations for comments published in newspapers pertaining to pending litigation because failed to meet "clear and present danger" test). *Markfield* signalled the first application of the "clear and present danger" standard to extrajudicial speech of attorneys. *Markfield*, 370 N.Y.S.2d at 85.

81. *Markfield*, 370 N.Y.S.2d at 82, 84.

82. *Id.*

ing that the rule should be restricted only to those situations where the extrajudicial statements presented a clear and present danger to the fair administration of justice.<sup>83</sup>

#### b. Serious and Imminent Threat

The "serious and imminent threat" formulation derives from *Craig v. Harney*,<sup>84</sup> in which the United States Supreme Court used this language interchangeably with "clear and present danger."<sup>85</sup> In 1975, the United States Court of Appeals for the Seventh Circuit, in *Chicago Council of Lawyers v. Bauer*,<sup>86</sup> applied the "serious and imminent threat" formulation to attorneys in deciding that the ABA's DR 7-107 was unconstitutionally vague and overbroad.<sup>87</sup> The court, in its declaratory judgment, emphasized that only those lawyer comments that "pose a 'serious and imminent threat' of interference with the fair administration of justice can be constitutionally proscribed."<sup>88</sup>

#### c. Reasonable Likelihood

The United States Court of Appeals for the Fourth Circuit, in *Hirschkop v. Snead*,<sup>89</sup> declared that the "reasonable likelihood" standard was to be applied to professional rules of conduct defining extrajudicial speech of attorneys.<sup>90</sup> The ABA's 1970 Code of Professional Responsibility also employs the "reasonable likelihood" formulation.<sup>91</sup> DR 7-107 prohibits a lawyer from making an extrajudicial comment that is "reasonably likely" to interfere with the administration of justice.<sup>92</sup>

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83. *Id.* at 84-85.

84. 331 U.S. 367, 373 (1947).

85. *See id.* at 372-73. After reaffirming the use of the "clear and present danger" standard, the Court in *Craig* summarized by saying that freedom of speech and the press cannot be impaired unless "there is no doubt that the utterances in question are a serious and imminent threat to the administration of justice." *Id.*; *see also* Brief for the United States as Amicus Curiae at 13-14, *Gentile* (No. 89-1836). Previously, in 1941, the Court in *Bridges* had commingled the language "serious" and "imminent" with the "clear and present danger" standard. *Bridges v. California*, 314 U.S. 252, 262-63 (1941).

86. 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

87. *Id.* at 249.

88. *Id.* In *Bauer*, an association of lawyers sought an injunction against enforcement of a local rule that incorporated DR 7-107, proscribing extrajudicial comments by attorneys during civil or criminal cases. *Id.* at 242-43. The court rejected the "reasonable likelihood" standard in favor of the more stringent "serious and imminent threat of interference with the fair administration of justice" standard. *Id.* at 243.

89. 594 F.2d 356 (4th Cir. 1979) (en banc).

90. *Id.* at 368. *Hirschkop* involved a suit filed by an attorney to challenge the Virginia version of DR 7-107. *Id.* at 356. The court upheld the disciplinary rule as constitutional, but found certain provisions to be overbroad and void for vagueness. *Id.* at 356-57.

91. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1980).

92. *Id.* In 1975, the United States Court of Appeals for the Seventh Circuit,

Courts applying the "reasonable likelihood" standard in restricting extrajudicial speech of attorneys justify the use of a less stringent test for attorneys because of their unique status as "officers of the court."<sup>93</sup>

#### d. Substantial Likelihood of Material Prejudice

Model Rule 3.6 uses the "substantial likelihood of materially prejudicing an adjudicative proceeding" formulation in regulating the extrajudicial speech of attorneys.<sup>94</sup> This formulation is used by the majority of states that have incorporated ABA Rule 3.6 into their professional rules of ethics.<sup>95</sup> Despite the prevalence of this formulation, there has been a paucity of judicial opinions as to the proper interpretation of the standard.<sup>96</sup>

The "substantial likelihood of material prejudice" formulation approximates the "clear and present danger" test.<sup>97</sup> The Supreme Court

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in *Bauer*, vehemently attacked this more lenient standard as being overbroad, vague and not complying with constitutional standards. *Bauer*, 522 F.2d at 249-50.

93. Brief for the United States as Amicus Curiae at 14-15, *Gentile* (No. 89-1836); see, e.g., *Hirschkop*, 594 F.2d at 369, 370; *In re Hinds*, 449 A.2d 483, 489 (1982).

94. For the full text of the Rule, see *supra* note 2. The "substantial likelihood of material prejudice" formulation can be found in section (a) of Rule 3.6.

95. See *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2741 n.1 (1991) (listing states that have adopted "substantial likelihood of material prejudice" formulation).

96. *Gentile* is the first Supreme Court case to address the issue of extrajudicial speech of attorneys and professional no-comment rules, and the only case to have addressed Rule 3.6. See *supra* note 7 and accompanying text. Lower court opinions have dealt exclusively with the ABA Code of Professional Responsibility DR 7-107. See *Hirschkop v. Snead*, 594 F.2d 356, 373-74 (4th Cir. 1979) (holding DR 7-107 did not violate First Amendment with respect to criminal trials, but that certain provisions were void for vagueness and that DR 7-107 was overbroad in restricting comments made by lawyers associated with civil litigation and administrative hearings); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975) (holding DR 7-107 unconstitutionally overbroad as related to criminal litigation because "reasonable likelihood" standard improper—proper standard should be "serious and imminent threat"; DR 7-107 unconstitutional in regard to civil litigation if extrajudicial speech deemed presumptively prohibited); *In re Keller*, 693 P.2d 1211, 1214 (Mont. 1984) (holding DR 7-107 unconstitutional without creating clear standard for attorney conduct; court refused to imply standard stating new rule should be drafted); *Markfield v. Association of the Bar*, 370 N.Y.S.2d 82, 84-85 (1975) (holding DR 7-107 should be restricted only to situations where extrajudicial statements pose "clear and present danger" to administration of justice), *appeal dismissed*, 337 N.E.2d 612 (N.Y. 1975); see also *In re Sawyer*, 360 U.S. 629 (1959) (holding attorney's speech outside courtroom during trial did not impugn integrity of presiding judge; Canons of Professional Ethics not violated).

97. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(a) (1983). Four members of the Court in *Gentile* agreed that the "substantial likelihood of material prejudice" formulation in Model Rule 3.6 is equivalent to the traditional "clear and present danger" standard. See *Gentile*, 111 S. Ct. at 2725 (Kennedy, J. dissenting); see also Brief for the United States as Amicus Curiae at 15, *Gentile*

has made no practical distinction between the "serious and imminent threat" and "clear and present danger" formulations.<sup>98</sup> Some courts and commentators maintain that there is no difference between the "reasonable likelihood" formulation and the other variants.<sup>99</sup> Although four different semantic formulations have evolved in the courts, authority exists for the proposition that no practical difference can be maintained among them when the standards are applied to restrictions on speech.<sup>100</sup>

Chief Justice Rehnquist, joined by four members of the Court, in dicta, proffered that the original "clear and present danger" standard has yielded to a less demanding "substantial likelihood of material prejudice" standard in determining when an attorney's speech can be abrogated in favor of the fair administration of justice.<sup>101</sup> While Chief Justice Rehnquist in *Gentile* diluted the standard of First Amendment review for attorneys from strict scrutiny to something less demanding, he gave no guidelines for the application of this new standard.<sup>102</sup> Ques-

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(No. 89-1836) ("[T]he test applied in this case and the 'serious and imminent threat' test are both equivalent to the 'clear and present danger' standard."); HAZARD & HODES, *supra* note 1 at 666 (research notes to Proposed Final Draft of Rule 3.6 indicate "substantial likelihood of material prejudice" meant to approximate "clear and present danger" test regarding speech and requires case-by-case inquiry); Matheson, *supra* note 54, at 917 ("MR 3.6's 'substantial likelihood of material prejudice' is meant to approximate the clear and present danger formulation."); *But see In re Keller*, 693 P.2d at 1214 (refusing to imply standard after noting three possible standard formulations).

98. For a discussion of the lack of distinction, see *supra* note 97 and accompanying text. See also Matheson, *supra* note 54, at 917 ("clear and present danger" and "serious and imminent threat" standards were both articulated in *Bridges* and have been viewed as substantially indistinguishable).

99. Brief for the United States as Amicus Curiae at 15, *Gentile* (No. 89-1836). For a prophetic discussion of the "clear and present danger," "serious and imminent threat" and "reasonable likelihood of prejudice" standards, see Rotondo, *supra* note 47, at 1111-18. The author concluded, ten years before *Gentile* was decided, that there was no real difference between the standards, other than their semantic variations. *Id.* at 1118-19. This is precisely what Justice Kennedy and three members of the Court stated in Part IB of the majority opinion. *Gentile*, 111 S. Ct. at 2725; see also *In re Keller*, 693 P.2d at 1214. In *Keller*, the court dismissed the complaint against an attorney for making extrajudicial statements. *Id.* The court refused to imply a standard for review of the extrajudicial speech when it was unclear how the disciplinary rule should be applied. *Id.* Three standards were described: "reasonable likelihood," "serious and imminent threat" and "clear and present danger." *Id.* The court recommended that a new rule be drafted. *Id.*

100. For a discussion of this authority, see *supra* notes 68-99 and accompanying text.

101. *Gentile*, 111 S. Ct. at 2744-45. For a discussion of this dicta in the *Gentile* opinion, see *infra* notes 129-30 & 157-62 and accompanying text.

102. *Gentile*, 111 S. Ct. at 2745. The Court failed to address what must be established to find an attorney in violation of Rule 3.6 because the new standard was not applied to *Gentile*. *Id.* Because Rule 177 was held unconstitutional on the grounds of vagueness as applied by Nevada, there was no need for the Court to apply the "substantial likelihood of material prejudice" test to the facts in

tions are left unanswered. Does the government interest in a fair trial always override attorneys' speech, no matter what the specific circumstances of the speech entail? Is it legitimate to impose absolute restrictions on attorneys' speech in a form analogous to a "prior restraint" when less restrictive means are available? How are the interests of the government, the attorney, the accused, the press and the public to be balanced?

Although the standards have been built into the professional rules governing the extrajudicial speech of attorneys, and the rules have had innumerable revisions, the *Gentile* case illustrates that much dissent, variation and confusion in interpretation still exists. Unless the path is better illuminated and remaining questions answered, both the right to free speech and to the fair administration of justice may falter.<sup>103</sup>

### III. *GENTILE v. STATE BAR OF NEVADA*

On January 31, 1987, Las Vegas Metropolitan Police Department reported large quantities of drugs and money missing from a safety deposit vault at Western Vault Corporation.<sup>104</sup> The sheriff named several police officers and Western Vault employees as possible suspects.<sup>105</sup> Mr. Gentile's client, Grady Sanders, was the owner of Western Vault Corporation.<sup>106</sup> The Las Vegas police department had been using the drugs and money as a part of an undercover operation.<sup>107</sup> Although two police officers and Sanders were initially listed as suspects, the two officers were "cleared" of any wrongdoing and the investigation shifted toward vault company employees.<sup>108</sup>

While the media exonerated the police,<sup>109</sup> the news coverage and

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*Gentile*. *Id.* at 2723, 2731. Chief Justice Rehnquist in his dissent defended Rule 177 as being constitutionally sound and found Gentile in violation of the Rule, but the Chief Justice spoke for only four members of the Court. *Id.* at 2745-48 (Rehnquist, C.J., dissenting).

103. Interview with Dominic P. Gentile, Petitioner in *Gentile v. State Bar of Nevada*, and Neil G. Galatz, Esq., representing Mr. Gentile before the State Bar and Supreme Court of Nevada, in Las Vegas, Nev. (Aug. 15, 1991).

104. *Gentile*, 111 S. Ct. at 2727.

105. *Id.*

106. *Id.*

107. *Id.*

108. Brief for Petitioner at 3, *Gentile* (No. 89-1836). The press reported that the two police suspects had been cleared by police investigation after passing lie detector tests. *Id.* at 4. The lie detector tests were administered by an individual named Ray Slaughter, who subsequently was arrested by the FBI for distributing cocaine. *Id.* In addition, press reports indicated that Grady Sanders had refused to take a police lie detector test. *Gentile*, 111 S. Ct. at 2728.

109. Newspaper articles quoted high police officials stating they had "complete faith and trust" in their officers. Brief for Petitioner at 3, *Gentile* (No. 89-1836) (synopsis of media coverage). Mr. Gentile, monitoring the preindictment publicity, was personally aware of at least seventeen articles in major local newspapers, the Las Vegas Sun and the Las Vegas Review Journal, and numerous

police investigation became narrowly focused on Sanders as the prime suspect.<sup>110</sup> Ultimately, Mr. Sanders was indicted.<sup>111</sup> Petitioner Dominic P. Gentile, a well known and respected criminal defense attorney in Nevada, held the first press conference of his career shortly after Sanders' indictment.<sup>112</sup> Gentile spoke publicly to rebut the "barrage of

local television news stories which reported on Western Vault and the ensuing investigation. *Gentile*, 111 S. Ct. at 2728.

110. See *Gentile*, 111 S. Ct. at 2727-28. For a more detailed accounting of pre-indictment publicity, see Brief for Petitioner, Joint Appendix, *Gentile* (No. 89-1836).

111. Brief for Petitioner at 6, *Gentile* (No. 89-1836).

112. *Gentile*, 111 S. Ct. at 2727-29. Mr. Sanders was indicted on February 5, 1988, on charges of larceny, racketeering and narcotics trafficking. Brief for Petitioner at 6, *Gentile* (No. 89-1836) (citing Alan Tobin & Warren Bates, *Vault Owner Indicted in Deposit Box Thefts*, LAS VEGAS REV. J., Feb. 6, 1988, at 1A). The indictment included a count alleging that Mr. Sanders had stolen narcotics and travelers' checks, valued at \$1.3 million, from the Metro safety deposit box at Western Vault. *Id.* The indictment further alleged that Mr. Sanders had stolen \$2 million from other customers of Western Vault. *Id.*

Mr. Gentile's opening remarks at the press conference held on February 5, 1988 were as follows:

I want to start this off by saying in clear terms that I think that this indictment is a significant event in the history of the evolution of sophistication of the City of Las Vegas, because things of this nature, of exactly this nature have happened in New York with the French connection case and in Miami with cases—at least two cases there—have happened in Chicago as well, but all three of those cities have been honest enough to indict the people who did it; the police department, crooked cops.

When this case goes to trial, and as it develops, you're going to see that the evidence will prove not only that Grady Sanders is an innocent person and had nothing to do with any of the charges that are being leveled against him, but that the person that was in the most direct position to have stolen the drugs and money, the American Express Travelers' checks, is Detective Steve Scholl.

There is far more evidence that will establish that Detective Scholl took these drugs and took these American Express Travelers' checks than any other living human being.

And I have to say that I feel that Grady Sanders is being used as a scapegoat to try to cover up for what has to be obvious to people at Las Vegas Metropolitan Police Department and at the District Attorney's office.

Now, with respect to these other charges that are contained in this indictment, the so-called other victims, as I sit here today I can tell you that one, two—four of them are known drug dealers and convicted money launderers and drug dealers; three of whom didn't say a word about anything until after they were approached by Metro and after they were already in trouble and are trying to work themselves out of something.

Now, up until the moment, of course, that they started going along with what detectives from Metro wanted them to say, these people were being held out as being incredible and liars by the very same people who are going to say now that you can believe them.

Another problem that you are going to see develop here is the fact that of these other counts, at least four of them said nothing about any

police and prosecution-initiated publicity adverse to [his client].”<sup>113</sup> Six months later the criminal case was tried to a jury.<sup>114</sup> Mr. Sanders was acquitted on all counts.<sup>115</sup>

Ten months after the press conference, the State Bar of Nevada filed a complaint against Gentile, alleging that he had violated Nevada Supreme Court Rule 177 for statements made at the press conference.<sup>116</sup> Nevada Supreme Court Rule 177 prohibits an attorney from

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of this, about anything being missing until after the Law [sic] Vegas Metropolitan Police Department announced publicly last year their claim that drugs and American Express Travelers’ c[h]ecks were missing.

Many of the contracts that these people had show on the face of the contract that there is \$100,000 in insurance for the contents of the box.

If you look at the indictment very closely, you’re going to see that these claims fall under \$100,000.

Finally, there were only two claims on the face of the indictment that came to our attention prior to the events of January 31 of ‘87, that being the date that Metro said that there was something missing from their box.

And both of these claims were dealt with by Mr. Sanders and we’re dealing here essentially with people that we’re not sure if they ever had anything in the box. That’s about all I have to say.

[Questions from the floor followed.]

*Gentile*, 111 S. Ct. at 2736-37. For Mr. Gentile’s motivation in holding the press conference, see *infra* note 113 and accompanying text. See also *Gentile*, 111 S. Ct. at 2731 & n.2, 2739 (petitioner’s responses to questions from the floor during press conference).

Mr. Gentile is a Nevada attorney with a national reputation as an advocate, instructor and leader in bar groups. Mr. Gentile has also authored several articles about criminal law and procedure, and is a former Associate Dean of the National College for Criminal Defense Lawyers and Public Defenders. *Id.* at 2728.

113. Brief for Petitioner at 2, *Gentile* (No. 89-1836). Mr. Gentile “did not blunder into a press conference but acted with considerable deliberation.” *Gentile*, 111 S. Ct. at 2728. Mr. Gentile had been personally aware of at least 17 newspaper articles in major Las Vegas papers and numerous television stories over the prior 11 months that had released information which would potentially poison a jury venire. *Id.* These stories contained reports of polygraph tests and information that the police were no longer suspects. *Id.* Mr. Gentile was also concerned because the preindictment investigation had “taken a serious toll” on his client. *Id.* Grady Sanders was not in good health—he had undergone multiple open-heart surgeries prior to these events and the suspicion of wrongdoing had forced Western Vault to close. *Id.* Prior to his press statement, Mr. Gentile carefully researched an attorney’s obligations under Nevada Supreme Court Rule 177. *Id.* at 2729. Mr. Gentile concluded that because the court had set a trial date for some six months hence, the content of his proposed statement would not be “substantially likely to result in material prejudice.” *Id.*

114. *Gentile*, 111 S. Ct. at 2729-30.

115. *Id.* at 2730-31. “The trial judge questioned the jury venire about publicity.” *Id.* at 2730. Although many jurors had vague recollections about reports of cocaine missing from Western Vault and a police coverup, and one juror remembered that the police had been cleared from suspicion, not a single juror remembered the petitioner, Mr. Gentile, or his press conference. *Id.*

116. Brief for Petitioner, Joint Appendix at 10, *Gentile* (No. 89-1836).

making "an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding."<sup>117</sup> The Rule lists a number of statements that ordinarily would result in material prejudice, and would therefore violate the ethical obligation imposed by the Rule.<sup>118</sup> Also, the Rule contains a "safe harbor" provision enumerating comments that an attorney may make without fear of violating the rule.<sup>119</sup>

Following a hearing, the Southern Nevada Disciplinary Board of the

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117. NEV. REV. STAT. ANN. Sup. Ct. Rule 177 (Michie 1991).

118. *Id.* According to Rule 177, statements which will likely result in material prejudice relate to:

- (a) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
- (b) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;
- (c) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
- (d) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
- (e) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or
- (f) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

*Id.*

119. *Id.* The "safe harbor" provisions of Rule 177 include:

Notwithstanding subsection 1 and 2(a-f), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

- (a) the general nature of the claim or defense;
- (b) the information contained in a public record;
- (c) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;
- (d) the scheduling or result of any step in litigation;
- (e) a request for assistance in obtaining evidence and information necessary thereto;
- (f) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
- (g) in a criminal case:
  - (i) the identity, residence, occupation and family status of the accused;
  - (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
  - (iii) the fact, time and place of arrest; and



State Bar found that in making his statements at the February 5, 1988 press conference, Mr. Gentile violated Rule 177.<sup>120</sup> The Board recommended a private reprimand.<sup>121</sup> Mr. Gentile appealed the Board's decision to the Nevada Supreme Court, thereby waiving the confidentiality of the disciplinary proceeding.<sup>122</sup> The Nevada Supreme Court affirmed the decision of the Disciplinary Board.<sup>123</sup> The United States Supreme Court granted certiorari, and in a disparate five-four decision, reversed the judgment of the Nevada Supreme Court.<sup>124</sup>

In *Gentile v. State Bar of Nevada*,<sup>125</sup> the Court held that Nevada's application of Rule 177 violated the First Amendment on the grounds of vagueness.<sup>126</sup> The five-member majority believed that the safe harbor provision's ambiguous grammatical structure, "absent any clarifying interpretation" by state courts, failed to "provide fair notice" to Mr. Gentile. Therefore, the Court held that Rule 177, as applied to Mr. Gentile, was void for vagueness.<sup>127</sup>

A different five-member consensus of the Court endorsed a discussion extending beyond the scope of the holding.<sup>128</sup> In dicta, Chief Jus-

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(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

*Id.*

120. Brief for Petitioner, Joint Appendix at 5, *Gentile* (No. 89-1836).

121. *Id.*

122. Brief for Petitioner at 13, *Gentile* (No. 89-1836).

123. *Gentile v. State Bar of Nevada*, 787 P.2d 386, 387-88 (Nev. 1990), *cert. granted*, 111 S. Ct. 669 (1991), *rev'd*, 111 S. Ct. 2720 (1991).

124. *Gentile*, 111 S. Ct. at 2736.

125. 111 S. Ct. 2720 (1991). Justice Kennedy announced the holding of the case in Parts III and VI of his opinion, joined by Justices Marshall, Blackmun, Stevens and O'Connor. Parts I, II, IV and V of Justice Kennedy's opinion were joined by Justices Marshall, Blackmun and Stevens only. Chief Justice Rehnquist delivered the opinion of the Court in dicta with respect to Parts I and II of his opinion, with Justices White, Scalia, O'Connor and Souter joining. Chief Justice Rehnquist filed a dissenting opinion in Part III of his opinion in which Justices White, Scalia and Souter joined. Justice O'Connor filed a concurring opinion. *Id.* at 2723.

126. *Id.* at 2723, 2731. The Rule's safe harbor provision, Rule 177(3), misled Mr. Gentile into thinking he could make statements at the press conference without violating the Rule's restrictions. *Id.* at 2723, 2731. For the text of Nevada's disciplinary rule, see *supra* text accompanying note 117 and notes 118-19.

127. *Gentile*, 111 S. Ct. at 2731. The four members of the Court who joined Justice Kennedy in the holding were Justice Marshall, Justice Blackmun, Justice Stevens and Justice O'Connor. *Id.* at 2723.

128. *Id.* at 2744. Justices White, O'Connor, Scalia and Souter joined Chief Justice Rehnquist in this part of the opinion. Justice Kennedy, joined by Justices Marshall, Blackmun and Stevens, objected to the five-member Supreme Court conclusion that review of attorney speech can be regulated under a more deferential standard. *Id.* at 2732. Justice Kennedy stated:

We have not in recent years accepted our colleagues' apparent theory that the practice of law brings with it comprehensive restrictions, or that we will defer to professional bodies when those restrictions impinge upon First Amendment freedoms. And none of the justifications

tice Rehnquist, writing for this five-member consensus, stated that the speech of attorneys participating in pending litigation may be regulated under a "less demanding" standard than that used to regulate the press.<sup>129</sup> These members agreed that, while the more stringent standard of "clear and present danger" is appropriate in First Amendment analysis reviewing restrictions of speech for the press and third parties, the less demanding "substantial likelihood of material prejudice" standard can constitutionally be applied to lawyers involved in pending litigation.<sup>130</sup>

This Note proposes a revision of Model Rule 3.6 premised on the logic that if Nevada's interpretation of the Rule violated the First Amendment, then thirty-one other states using Model Rule 3.6 can also be ensnared.<sup>131</sup> The *Gentile* Court concluded that Nevada's interpreta-

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put forward by respondent suffice to sanction abandonment of our normal First Amendment principles in the case of speech by an attorney regarding pending cases.

*Id.* at 2734.

129. *Id.* at 2744. The standard defined as appropriate for review of press activity was established by the Court in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). The Court used Judge Learned Hand's formulation of "clear and present danger"—the gravity of the evil discounted by its improbability must justify such invasion of free speech as is necessary to avoid the danger—and applied it to prior restraint of the press. *Id.* at 562. In *Nebraska Press*, the Court reversed an order imposing prior restraint on the news media to prevent publication or broadcast of facts "strongly implicative" of the accused in a widely publicized murder case. *Id.* at 543-45. The Court stated that while "the guarantees of freedom of expression are not an absolute prohibition under all circumstances, . . . the barriers to prior restraint remain high and the presumption against its use continues intact." *Id.* at 570. This "barrier" protecting the freedom of the press is much more formidable than the "substantial likelihood of material prejudice" standard used to limit an attorney's speech. *Gentile*, 111 S. Ct. at 2741. Although no prior restraints were involved in the *Gentile* decision, Chief Justice Rehnquist made the comparison between *Nebraska Press* and *Gentile* because Mr. Gentile asserted the *Nebraska Press* standard should be used for attorneys. *Id.* at 2740. Mr. Gentile likened the prohibitive sections of Rule 3.6 to the "chilling effect" of prior restraints.

130. *Gentile*, 111 S. Ct. at 2742-45. For a discussion of the difference between these standards, see *In re Keller*, 693 P.2d 1211, 1212-14 (Mont. 1984). The Supreme Court of Montana held that although it had the power to imply a standard for disciplinary rules governing the extrajudicial speech of attorneys, it would not do so as a matter of policy because implied standards give no guidance to attorneys. *Id.* at 1214. After identifying three possible standards for disciplinary rules—"clear and present danger," "reasonable likelihood to interfere with a fair trial" and "serious and imminent threat"—the court decided the standard should be considered anew and another disciplinary rule drafted. *Id.*

131. Although Justice Kennedy and four members of the Court held that Nevada's Rule 177 was void for vagueness as applied, it is clear from the Court's opinion that the holding is limited to Nevada's application of the Rule under the facts of this case and does not invalidate ABA Rule 3.6 as unconstitutional. *Gentile*, 111 S. Ct. at 2725.

Chief Justice Rehnquist, on the other hand, joined by four members of the Court in Part II of his opinion, discussed the fact that 31 states, in addition to Nevada, have adopted ABA Rule 3.6. *Id.* at 2741. In this part of the opinion,

tion of Rule 177 created a "trap for the wary as well as the unwary"; however, the Court failed to provide instruction on how to avoid the "trap" short of relying on a judicial determination.<sup>132</sup> A revision of the Rule could facilitate interpretation, provide direction and help rescue attorneys from the vagueness "trap."

#### A. *The Void For Vagueness Holding*

A five-member majority of the Supreme Court held that Rule 177, as interpreted by Nevada courts, was void for vagueness because the Rule's "grammatical structure . . . absent any clarifying interpretation by the state court, . . . fails to provide 'fair notice to those to whom [it] is directed.'" <sup>133</sup> The Court focused on one of the Rule's safe harbor provisions, Rule 177(3)(a), which provides that statements of a "general nature" made about the defense of a case, "without elaboration," are permissible "notwithstanding" the speech specifically prohibited in subsections (1) and (2).<sup>134</sup> The Court believed that the use of the word "notwithstanding" in the grammatical structure of the Rule causes an attorney to think that the prohibitions set out earlier in the Rule can be disregarded.<sup>135</sup> The Court explained that the *grammatical structure* of this provision, *absent any clarifying interpretation* by the state courts, gives a lawyer no notice of when his or her remarks "pass from the safe harbor of the general into the forbidden sea of the elaborated."<sup>136</sup> As Justice Kennedy pointed out, Mr. Gentile was found in violation of the Rule

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Chief Justice Rehnquist endorsed the constitutionality of the "substantial likelihood of material prejudice" standard. *Id.* at 2745. Part II traces the evolution of the "clear and present danger" standard relative to the First Amendment and generally addresses ethical restrictions on lawyers' extrajudicial speech. *Id.* at 2740-45. The content of Chief Justice Rehnquist's opinion strongly implies that more than just Nevada's Rule 177 is at stake. See *STONE ET AL.*, *supra* note 67, at 32-33, 48-51 (casebook focuses on Chief Justice Rehnquist's opinion teaching that *Gentile* stands for broad proposition that lawyers' speech may be held to more restrictive First Amendment standard).

132. *Gentile*, 111 S. Ct. at 2732.

133. *Id.* at 2731 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972)) (emphasis added).

134. NEV. REV. STAT. ANN. Sup. Ct. Rules 177 (Michie 1991). Rule 177(3)(a) states in pertinent part: "Notwithstanding subsection 1 and 2(a-f), a lawyer involved in the investigation or litigation of a matter may state *without elaboration* . . . the *general nature* of the claim or defense." *Id.* (emphasis added). Rule 177(1) states a "lawyer shall not make an extrajudicial statement . . . if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding." *Id.* Rule 177(2) delineates the areas of prohibited speech. For the pertinent text of Rule 177, see *supra* note 118. For the pertinent text of Rule 3.6 see *supra* note 2.

135. *Gentile*, 111 S. Ct. at 2731. Although the word "notwithstanding" may cause confusion as to where lines should be drawn, it is unlikely that an attorney will violate any prohibition in the Rule that is *clearly* set forth. The real problem is not the word "notwithstanding," but rather clearly delineating the "safe harbors" separately from the prohibited speech.

136. *Id.* at 2731.

even after making a “conscious effort at compliance.”<sup>137</sup> The combination of ambiguous grammatical structure and lack of judicial interpretation left the Rule prey to vagueness, misinterpretation and selective enforcement.<sup>138</sup>

The majority, in reaching its void for vagueness holding, considered the political nature of Gentile’s speech criticizing the Las Vegas Police Department.<sup>139</sup> Political speech, which criticizes government and its officials, lies at the heart of the First Amendment. It safeguards against the miscarriage of justice by subjecting the police, the prosecutors and the judicial processes to extensive public scrutiny and criticism.<sup>140</sup> Justice Kennedy, speaking for five members of the Court, stated that it was the professional mission of the criminal defense bar to challenge actions of the State.<sup>141</sup> Only four members of the Court, however, believed that the issue of political speech dominated the constitutional analysis in Gentile’s case.<sup>142</sup>

Although the Court emphasized that it was merely holding Nevada’s interpretation of Rule 177 void for vagueness, the Court, in effect, held that Model Rule 3.6 itself is void for vagueness as evidenced by Nevada’s erroneous interpretation.<sup>143</sup> According to the Supreme Court, Nevada

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137. *Id.* at 2732. Justice O’Connor, the fifth concurring vote in the Court’s holding, pointed out that “[b]oth Gentile and the disciplinary board have valid arguments on their side, but this serves to support the view that the rule provides insufficient guidance.” *Id.* at 2749 (O’Connor, J., concurring). Justice O’Connor, in addition to writing separately, joined Justice Kennedy in Part III of his opinion (void for vagueness holding) and joined Chief Justice Rehnquist in Parts I and II of his opinion (“substantial likelihood of material prejudice” dicta). *Id.* at 2748-49.

138. *Id.* at 2724.

139. *Id.* “[T]his case involves classic political speech. . . . At issue here is the constitutionality of a ban on political speech critical of the government and its officials.” *Id.* There was a real possibility of police misconduct in the *Gentile* case, since the stolen cocaine and money deposited at Western Vault belonged to the Las Vegas Metropolitan Police Department. For a discussion of the facts of *Gentile*, see *supra* notes 104-24 and accompanying text. “The media and the public were interested to know whether police officers were involved in the thefts, or whether Mr. Sanders or others were responsible.” Petition for Writ of Certiorari to the State of Nevada at 5, *Gentile* (No. 90-1836).

140. *Gentile*, 111 S. Ct. at 2724-25 (citing *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966)).

141. *Id.* at 2732.

142. *Id.* at 2724, 2732. Part I of Justice Kennedy’s opinion, joined by Justices Marshall, Blackmun and Stevens, emphasized the political speech aspect of *Gentile*. *Id.* at 2724-26. Part III, encompassing the Court’s void for vagueness holding, also referred to political speech. *Id.* at 2732.

143. Although the void for vagueness holding is qualified by Justice Kennedy in that he believed the Rule itself was not flawed if interpreted in a proper and narrow manner—apparently that was difficult to do. *Gentile*, 111 S. Ct. at 2725. Justice Marshall, speaking for the Court in *Grayned v. City of Rockford*, 408 U.S. 104, 108-10 (1972), explained that if the Court were left to “just the words of the ordinance,” the Court may have been troubled by imprecision in the wording. *Id.* at 111. The implication was that without the Court’s “extrapo-

had difficulty interpreting the Rule.<sup>144</sup> Presumably, if the Rule itself were easy to interpret, Mr. Gentile, the State Bar of Nevada, the Nevada Supreme Court and all the Justices of the United States Supreme Court would have been in agreement.<sup>145</sup> Justice O'Connor makes this point in her concurring opinion.<sup>146</sup> Whether Rule 177 is vague as interpreted or vague as written, the same "evils" inhere.<sup>147</sup> Lack of notice, discriminatory enforcement and unnecessary restraint on freedom of speech result from both vague law and vague interpretations of such law.<sup>148</sup>

Because Nevada Supreme Court Rule 177 is identical to Model Rule 3.6, the void for vagueness holding has broad implications.<sup>149</sup> If the

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lation" of "allowable meaning" using text, interpretations of the court below and interpretations of those enforcing the statute, the ordinance, as written, provided insufficient guidance. *Id.* at 110-12. There appears to be a fine line between an unconstitutionally vague statute and an unconstitutionally vague interpretation—the difference being whether a court has a legitimate basis to "extrapolate" on the meaning of the language.

144. *Gentile*, 111 S. Ct. at 2723, 2731-32.

145. The difference of opinion between Justice Kennedy and Chief Justice Rehnquist as to whether the content of Dominic Gentile's statements did or did not violate Rule 177 is striking. Justices Kennedy, Marshall, Blackmun and Stevens believed that Gentile's statements to the press were appropriate because he disclosed no evidence from searches or test results, confessions or elaborations. *Id.* at 2730. Chief Justice Rehnquist and Justices Scalia, Souter and White believed that "[n]o sensible person could think that [Gentile's statements] were 'general' statements of a claim or defense made 'without elaboration.'" *Id.* at 2747 (Rehnquist, C.J., dissenting). This disparity indicated "the rule provides insufficient guidance." *Id.* at 2749 (O'Connor, J., concurring).

146. *Id.* at 2749 (O'Connor, J., concurring). Justice O'Connor stated that both Gentile and the Nevada Disciplinary Board had valid arguments, which served to support the view that the Rule provides insufficient guidance. *Id.* (O'Connor, J., concurring).

147. In *Grayned v. City of Rockford*, the Court denounced the evils of vague laws:

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked.

*Grayned*, 408 U.S. at 108-09 (footnotes omitted).

148. *Gentile*, 111 S. Ct. at 2749 (O'Connor, J., concurring).

149. Chief Justice Rehnquist pointed out in Part II of his opinion that

Supreme Court of Nevada and the State Bar of Nevada cannot properly interpret the Rule, and the United States Supreme Court can do so only in a five-four decision, then a real possibility exists that the thirty-one other states which have adopted Model Rule 3.6 will have substantially the same difficulty.<sup>150</sup>

Because only five members of the Court endorsed the void for vagueness holding, and because much of Justice Kennedy's opinion represented the views of only four members of the Court, the *Gentile* holding remains ripe for controversy. This lack of unity undermines the Court's holding and vitiates the Rule's attempt to provide guidance to attorneys who seek to speak in the "court of public opinion."

### B. The "Substantial Likelihood of Material Prejudice" Standard

A lack of consensus also existed among members of the *Gentile* Court as to the proper interpretation of the "substantial likelihood of material prejudice" standard.<sup>151</sup> Chief Justice Rehnquist and four mem-

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"[c]urrently, 31 States in addition to Nevada have adopted— either verbatim or with insignificant variation—Rule 3.6 of the ABA's Model Rules." *Id.* at 2741.

Justice Kennedy states, however, that the matter before the Court "does not call into question the constitutionality of other States' prohibitions upon an attorney's speech that will have a 'substantial likelihood of materially prejudicing an adjudicative proceeding,' but is limited to Nevada's interpretation of that standard." *Id.* at 2724.

150. Since its adoption in 1983 there has been very little adjudication involving ABA Model Rule 3.6. *See, e.g.,* *Levine v. United States Dist. Court*, 764 F.2d 590 (9th Cir. 1983) (court used verbiage of ABA Rule 3.6 in part to determine that restraining order was overbroad), *cert. denied*, 476 U.S. 1158 (1986). Prior to the adoption of Model Rule 3.6, there were only five challenges to the authority of the legal profession to discipline an attorney for improper publicity. *See Swift, supra* note 7, at 1047-49 n.298. All five cases dealt with DR 7-107 of the original ABA Canons of Professional Ethics. *See generally In re Sawyer*, 360 U.S. 622 (1959); *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); *In re Keller*, 693 P.2d 1211 (Mont. 1984); *Markfield v. Association of the Bar*, 370 N.Y.S.2d 82 (N.Y. App. Div. 1975), *appeal dismissed*, 375 N.Y.S.2d 106 (N.Y. 1975). *Gentile* is the first and only example of an attorney challenging the interpretation of ABA Model Rule 3.6. It is noteworthy that this first case ended up in the Supreme Court of the United States. The lack of cases does not signify a lack of problems with interpretation, but rather is evidence of the potential deterrent effect resulting from the vagueness of the rule (i.e., attorneys are chary to invoke the inconsistent and ambiguous "safe harbor" provision). *See Swift, supra* note 7, at 1029 ("the 'chilling effect' of professional sanctions . . . is a consequence which lawyers would be loathe to risk").

151. *Gentile*, 111 S. Ct. at 2723, 2725, 2740-45. The five-four split in dicta serves to undermine the already weak five-four holding of a different majority of the Court. The uncertain value of the dicta, coupled with the disparity of opinion regarding the "substantial likelihood" standard, obscured what should have been a standard approach to Model Rule 3.6.

Parts IV and V of Justice Kennedy's opinion are dicta relating to the appropriate standard for balancing First Amendment rights (freedom of speech) against governmental interests. *Id.* at 2732-36. Justice Kennedy, joined by Justices Marshall, Blackmun and Stevens, in Part IV of his opinion, objected to the

bers of the Court believed that the speech of lawyers representing clients in pending cases may generally be regulated under a less demanding standard than "clear and present danger."<sup>152</sup> Justice Kennedy and three members of the Court explicitly objected to Chief Justice Rehnquist's conclusion, contending that lawyer speech is subject to greater restrictions only when certain justifications exist.<sup>153</sup>

The "clear and present danger" standard, in its various forms, has historically been used to regulate the press and the speech of ordinary citizens.<sup>154</sup> Mr. Gentile argued that the same standard should be applied to the extrajudicial speech of attorneys.<sup>155</sup> The Nevada State Bar, however, distinguishing the decisions relied on by Mr. Gentile as not involving lawyers representing parties to pending litigation, advocated that a less demanding standard would be employed.<sup>156</sup> Chief Justice Rehnquist used these opposing views to frame the issue addressed in the dicta of *Gentile*: "whether a lawyer who represents a defendant involved with the criminal justice system may insist on the same standard before he is disciplined for public pronouncements about the case, or whether the State instead may penalize that sort of speech upon a lesser showing."<sup>157</sup>

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majority's conclusion that "Nevada may interpret its requirement of substantial likelihood of material prejudice under a standard more deferential than is the usual rule where speech is concerned." *Id.* at 2732. Part II of Chief Justice Rehnquist's opinion, joined by Justices Scalia, Souter, White and O'Connor, comprised the majority for the discussion in dicta which sanctioned the constitutionality of the more restrictive "substantial likelihood" standard for attorneys. *Id.* at 2740-45.

152. *Id.*

153. *Id.* at 2733. In support of his objections, Justice Kennedy distinguishes the cases relied on by Chief Justice Rehnquist as either involving commercial speech by attorneys or information that attorneys could access only through discovery. *Id.* Justice Kennedy explains that neither of those circumstances or underlying interests were implicated in the *Gentile* case. *Id.*

154. Swift, *supra* note 7, at 1014-15. Freedom of access by the press must meet the "most stringent of the modern constitutional tests, 'strict scrutiny.'" *Id.* at 1015. In establishing this standard the Court has held "[w]here . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest." *Id.* (citing *Globe News Paper Co. v. Superior Court*, 457 U.S. 596 (1982)). For further discussion of the "clear and present danger" standard, see *supra* notes 70-83 and accompanying text.

155. *Gentile*, 111 S. Ct. at 2740-42. Gentile relied on the "clear and present danger" standard as set forth by the Court in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), *Bridges v. California*, 314 U.S. 252 (1941), *Pennekamp v. Florida*, 328 U.S. 331 (1946), and *Craig v. Harney*, 331 U.S. 367 (1947). *Gentile*, 111 S. Ct. at 2742. In these cases, the Court held that courts could not use their contempt power to punish the press unless there was a "clear and present danger" of actual prejudice or imminent threat to the fair administration of justice. *Id.*

156. *Gentile*, 111 S. Ct. at 2742.

157. *Id.* at 2743.

According to Chief Justice Rehnquist, the “substantial likelihood of material prejudice” standard employed by Rule 3.6 requires a lesser showing by the State and can be used to limit lawyer comments that are *likely* to influence the outcome of a trial.<sup>158</sup> The restriction of a lawyer’s extrajudicial speech, when involved in pending litigation, is constitutional *even if there is no actual prejudice* or harm.<sup>159</sup> Chief Justice Rehnquist’s five-member consensus distinguished the standard used to regulate lawyers’ speech from that used to regulate the speech of the general public, because as officers of the court, lawyers are subject to ethical restrictions on speech, whereas ordinary citizens and the press are not.<sup>160</sup> Because of this distinction, and his belief that Rule 3.6 was sufficiently narrowly tailored to accomplish its objective,<sup>161</sup> Chief Justice Rehnquist concluded that Rule 177’s “substantial likelihood of material prejudice” standard is not violative of the constitutional mandates of the First Amendment.<sup>162</sup>

In contrast, Justice Kennedy and three other Justices believed that the critical concern was to assess the proximity and degree of harm, *regardless of how the standard is worded*.<sup>163</sup> Justice Kennedy acknowledged that the “substantial likelihood of material prejudice” standard could prove to be the semantic equivalent of the “clear and present danger” standard,<sup>164</sup> and because each standard requires an assessment of prox-

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158. *Id.* at 2745. Chief Justice Rehnquist explained that “the ‘substantial likelihood’ test embodied in Rule 177 is constitutional” and limits two evils: “(1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are *likely to prejudice* the jury venire, *even if an untainted panel can ultimately be found*.” *Id.* (emphasis added).

159. *Id.* at 2743.

160. *Id.*

161. *Id.* at 2745. “[Rule 177] is designed to protect the integrity and fairness of a state’s judicial system and impose only narrow and necessary limitations on lawyers speech.” *Id.*

162. *Id.* Chief Justice Rehnquist’s five-member consensus concluded: The regulation of attorneys’ speech is limited—it applies only to speech that is substantially likely to have a materially prejudicial effect; it is neutral as to points of view, applying equally to all attorneys participating in a pending case; and it merely postpones the attorney’s comments until after the trial. While supported by the substantial state interest in preventing prejudice to an adjudicative proceeding by those who have a duty to protect its integrity, the rule is limited on its face to preventing only speech having a substantial likelihood of materially prejudicing that proceeding.

*Id.*

163. *See id.* at 2732-34; *see also* Rotondo, *supra* note 47, at 1106, 1118 (referring to historical development of standards and illustrating Justice Kennedy’s point that difference in standards is merely one of semantics).

164. *Gentile*, 111 S. Ct. at 2725. Justice Kennedy noted that the drafters of Model Rule 3.6 apparently thought “the substantial likelihood of material prejudice formulation approximated the clear and present danger test,” because both standards focused on the likelihood of injury and its substantiality. *Id.* Justice Kennedy and his group also contended that a lower standard of scrutiny is less appropriate, particularly when applied to a defense attorney. *Id.* at 2725, 2734-



imity and degree of harm, each may be capable of valid interpretation.<sup>165</sup> When the proximity and degree of harm were assessed in this case, and used in balancing the State's interest in an unprejudiced trial against Gentile's First Amendment freedom of speech, Justice Kennedy opined that Rule 177, as interpreted by Nevada, failed to pass constitutional muster.<sup>166</sup> Rule 177, as applied to Mr. Gentile, limited First Amendment freedoms greater than was necessary or essential to protect the government's interests.<sup>167</sup> Furthermore, Justice Kennedy contended that this case was a poor vehicle to define the outer limits of a court's ability to constitutionally restrict an attorney's extrajudicial statements.<sup>168</sup>

The five-four votes tallying the holding and dicta in *Gentile* are tenuous and give little guidance.<sup>169</sup> Although the Court set down the constitutional standard to be used, it failed to apply the standard to Gentile's speech.<sup>170</sup> In light of the conflicting First Amendment approaches and

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35. Justice Kennedy pointed to the empirical research showing a lack of correlation between exposure to pretrial publicity and actual prejudice at trial. *Id.* at 2734. Justice Kennedy also pointed to the lack of anecdotal evidence showing that a defense attorney has ever managed to prejudice the prosecution's case. *Id.* Justice Kennedy emphasized that in many of the various committee reports which resulted in the promulgation of the ABA's Model Rule of Professional Conduct 3.6, there was no convincing case presented for restrictions on defense attorneys. *Id.* at 2735; see also Swift, *supra* note 7, at 1031-49.

165. *Gentile*, 111 S. Ct. at 2725.

166. *Id.* at 2734.

167. *Id.* at 2732-36. Justice Kennedy did not specifically mention what standard should be used, but stated that the Rule in this case "does not protect against a danger of the necessary gravity, imminence, or likelihood." *Id.* at 2736.

168. *Id.* at 2736.

169. The major philosophical split in how each five-member group of Justices approached First Amendment rights is noteworthy. On one hand, Justice Kennedy, writing for Justices Marshall, Blackmun, Stevens and O'Connor, held that Rule 177 (Model Rule 3.6) was ambiguous as written. *Id.* at 2731. This same group, with the exception of Justice O'Connor, believed that "substantial likelihood" is no different than "clear and present danger." *Id.* at 2724-25. This approach tends to favor First Amendment rights of attorneys, using a strict scrutiny test and minimizing the restrictions placed on speech.

On the other hand, Chief Justice Rehnquist, writing for Justices White, Scalia and Souter, believed that Rule 177 (Model Rule 3.6) was unambiguously drafted, and, along with Justice O'Connor, that the less demanding "substantial likelihood" standard can constitutionally restrict an attorney's extrajudicial speech. *Id.* at 2738-48. This approach tends to shrink an attorney's First Amendment rights, using an intermediate level of scrutiny and maximizing the restrictions placed on speech.

Justice O'Connor, joining both groups, seems to straddle the fence between these two opposing First Amendment philosophies.

170. Justice O'Connor joined Chief Justice Rehnquist's opinion condoning the "substantial likelihood of material prejudice" standard, and she also joined Justice Kennedy's opinion in the void for vagueness holding. *Id.* at 2748-49 (O'Connor, J., concurring). This switch effectively precluded the Court from applying its new constitutional standard to the facts of *Gentile*. *Id.* at 2723.

close voting by the Court, the *Gentile* opinion begs the question, exactly how should attorneys interpret Model Rule 3.6?

#### IV. PROPOSED REVISION OF MODEL RULE 3.6

##### A. *Justification*

There are two justifications for revising ABA Model Rule 3.6. The first justification would be to assist other states. Because Nevada's interpretation of the Rule was held to be unconstitutionally vague, other states will likely misinterpret the Rule's ambiguous language.<sup>171</sup> Second, the "substantial likelihood" standard is confusing. Not only is it unclear how "substantial likelihood" differs from "clear and present danger," but the use of two different standards—one for attorneys and one for the press and the public in general—can create a bias against attorneys restricted by Model Rule 3.6.<sup>172</sup>

The thirty-two states that have enacted Model Rule 3.6 will be looking to the *Gentile* decision for guidance and definition. Unfortunately, the void for vagueness holding and the "substantial likelihood of material prejudice" dicta in *Gentile* do little more than alert attorneys to the fact that Model Rule 3.6 should be consulted with caution. Short of burdening the judicial system each time Model Rule 3.6 is invoked, the efficient and logical remedy is to revise the Rule.

##### B. *A Revised Rule of Professional Conduct Governing Extrajudicial Speech of Attorneys*

To provide the best possible solution, a rule restricting speech of attorneys must balance all relevant interests and it must be precise.<sup>173</sup>

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171. Although Justice Kennedy stated that the issue before the Court was limited to Nevada's interpretation and application of the Rule, the ambiguity and grammatical concerns identified by the Court are still present in Model Rule 3.6. *Id.* at 2725, 2731.

172. The Supreme Court has described attorneys as "officer[s] of the court" to distinguish them from ordinary citizens. See *In re Sawyer*, 360 U.S. 622, 668 (1959) (Frankfurter, J., dissenting) (reversing sanction imposed on attorney for comments made outside courtroom alleging judicial unfairness). In *Sheppard v. Maxwell*, the Court stated that "[n]either prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function." *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966) (emphasis added). The *Sheppard* Court also warned that "there is nothing that proscribes the press from reporting. . . ." *Id.* at 362-63. This combination, restricting those under the jurisdiction of the courts while not restricting the media, sets up a double standard creating bias against a defendant without a media spokesperson. In *Gentile*, the Court admitted that only the speech "of those participating before the courts could be limited," and that Rule 177 did not apply to third parties. *Gentile*, 111 S. Ct. at 2743 & n.5.

173. Professor Swift suggested that a proposed rule must satisfy three requirements: "precision of regulation, empirically demonstrable relationship, and less restrictive alternative." Swift, *supra* note 7, at 1028. Stating that Model Rule 3.6 simply does not satisfy these requirements, Professor Swift offered an

The government's interest in promoting the fair administration of justice must be balanced against the attorney's First Amendment interest in free speech. Interests of the accused, the press and the public must also be considered.<sup>174</sup> The balancing analysis can be facilitated by clarifying the definition of the "substantial likelihood of material prejudice" standard. Precision can be achieved by changing the grammatical construction and elaborating on the safe harbor provisions of the current Rule.<sup>175</sup> The goal of these revisions is to disperse the uncertainty surrounding Model Rule 3.6 that remains after the *Gentile* decision.<sup>176</sup>

### 1. *The Void for Vagueness Problem*

The vagueness problem of Model Rule 3.6 can be cured by revising

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alternative: "a specifically tailored judicial order prohibiting proscribed publicity." *Id.* at 1051; *see also In re Primus*, 436 U.S. 412, 432 (" 'Broad prophylactic rules in the area of free expression are suspect,' and . . . '[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' " (citing *NAACP v. Button*, 371 U.S. 415, 438 (1963))). *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 251 (7th Cir. 1975) (stating that "there is a place and need for specific provisions in properly drawn rules"), *cert. denied*, 427 U.S. 912 (1976).

Courts, for years, have attempted to accommodate the First Amendment right of free speech and the right to a fair trial with a balancing approach. *See Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978) ("[T]he test requires a court to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to *balance* the character of the evil, as well as its likelihood, against the need for free and unfettered expression." (emphasis added)); *Pennekamp v. Florida*, 328 U.S. 331, 336 (1946) ("[R]eviewing courts are brought in cases . . . to appraise the comment on a *balance* between the desirability of free discussion and the necessity for fair adjudication, free from interruptions of its processes." (emphasis added)); *see also Rotondo, supra* note 47, at 1120 (proposing that fair trial rights have no priority over free speech rights and courts have already been using balancing approach as reasons which supported using factors in a "balancing test" approach to Disciplinary Rule 7-107).

The Court in *Nebraska Press* used Judge Learned Hand's balancing test, which weighed "the gravity of the 'evil,' discounted by its improbability, [against the] invasion of free speech . . . [needed] to avoid the danger." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976). The Court then examined the evidence with more precision, reviewing: 1) the nature and extent of pretrial publicity, 2) whether other measures would be likely to mitigate the effects of pretrial publicity, and 3) how effectively restraining speech would prevent the threatened danger. *Id.*

174. *Mares v. United States*, 383 F.2d 805, 808 (10th Cir. 1967), *appeal after remand*, 409 F.2d 1083 (10th Cir. 1968), *cert. denied*, 394 U.S. 963 (1969).

175. For a discussion of Justice Kennedy's opinion related to the ambiguous grammatical construction issue, *see supra* notes 133-50 and accompanying text. Currently, subsection (c)(3) of Model Rule 3.6 is the "safe harbor" provision. It is this same section in Nevada's Rule 177 which gave Mr. Gentile difficulty in determining what was permissible speech. *Gentile*, 111 S. Ct. at 2731-32.

176. *See Gentile*, 111 S. Ct. at 2731 (discussing ambiguous structure of Rule).

the ambiguous grammatical structure that was identified in *Gentile*.<sup>177</sup> Two new "safe harbor" provisions relating to the public interest and a "right of reply" should be added to give further guidance. "Remedial measures" for the attorney to consider prior to speaking extrajudicially should also be delineated.<sup>178</sup> These changes can be implemented by revising Section (c) of Rule 3.6 as it is currently written and by adding a Section (d). The revised text should read as follows:

(c) *Consistent with Sections (a) and (b)(1-6),*<sup>179</sup> a lawyer involved in the investigation or litigation of a matter *may state*:

(1) the *nature* of the claim or defense; [Sections (c)(2-7) should remain as written]<sup>180</sup>

(d) The following safe harbor provisions apply to a lawyer involved in the investigation or litigation of a matter:

(1) If a lawyer knows or has reason to know that danger to a public interest exists, the lawyer may disclose, in good faith, *any* information by means of public communication reasonably believed necessary to prevent harm to the public interest.<sup>181</sup> Disclosure of information reasonably believed necessary to protect the public interest may be made notwithstanding the restrictions on speech set forth in sections (a) and (b)(1-6) of this Rule.<sup>182</sup>

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177. For a discussion of grammatical issues, see *supra* notes 133-50 and accompanying text.

178. The "safe harbor" provisions permit an attorney to exercise his or her freedom of speech outside the courtroom under specific circumstances. The remedial measures serve two purposes: first, they should be considered by the attorney as an alternative to a "right of reply," and second, if needed, they should be invoked by the courts to "cure" potential prejudicial effects of pretrial publicity.

179. Whether Sections (b)(1-6) of Rule 3.6 create evidentiary "presumptions" is disputed. See Matheson, *supra* note 54, at 919; HAZARD & HODES, *supra* note 1, at 666. Professor Matheson suggests that if the list of prohibited speech in Rule 3.6 rises to the level of an evidentiary presumption, there may be difficulty in rebutting those "presumptions" because of the speculative nature of the determination. See Matheson, *supra* note 54, at 919. Whether Sections (b)(1-6) should be considered as evidentiary presumptions or merely as guidelines for attorneys is beyond the scope of this Note. These sections are not changed as part of the proposed revision of Rule 3.6.

180. For the language of the existing Rule 3.6, see *supra* note 2.

181. Although harm to the public interest is referred to in subsection (c)(6) of Model Rule 3.6 as currently written, the harm involved must emanate from "danger concerning the behavior of a person involved." For the text of subsection (c)(6), see *supra* note 2. This language implies that only harm from dangerous, criminal-type behavior may be forewarned. The new "safe harbor" provision, subsection (d)(1), is broader, focusing on the need to forewarn of harm to the public interest, whether caused by dangerous criminal-type behavior or governmental corruption. For an extended discussion of other sources of danger to the public interest, see *infra* notes 185-98 and accompanying text.

182. This section as written is consistent with ABA Rule 1.6 "Confidentiality of Information." Rule 1.6 states in part:

(2) A lawyer may, in good faith, to protect his client from substantial economic, physical or emotional harm, or public stigmatization, make an extrajudicial statement disseminated by means of public communication to counter pre-existing adverse publicity ("right of reply"). In doing so, the lawyer may:

- (i) make any statement that comports with subsection (c)(1-7) of this Rule; and
- (ii) make statements pertaining to evidence the lawyer knows is likely to be admissible and proper argument necessary to counter preexisting adverse publicity.

The information disclosed must not:

- (i) violate paragraphs (b)(2-6);
- (ii) relate to the criminal record of a party, suspect in a criminal investigation or witness or identity of a witness;
- (iii) be released within six months of jury selection without an order of the court; and
- (iv) be released in a community with a population that would prohibit the selection of impartial jurors during a reasonably extensive *voir dire*.

The following Comment to Section (d) should be provided:

A balancing approach must be used by the attorney seeking to make an extrajudicial statement under Model Rule 3.6. The interests of the public, the parties, and the State must be balanced against the attorney's decision to speak. The attorney must also consider the availability and potential effectiveness of judicial remedies (prior restraints, change of venue, continuance, jury instruction and sequestration) and *voir dire* as alternatives to extrajudicial speech.

#### a. The Grammatical Structure

The grammatical ambiguity has been resolved by replacing "notwithstanding" with "consistent with" in Section (c) of the Rule.<sup>183</sup>

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[A] lawyer shall not reveal information *relating to representation of a client* unless the client consents after consultation . . . except . . . [a] lawyer may reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983) (emphasis added).

In the case of a lawyer invoking Rule 3.6, either the lawyer will have the client's consent to disclose information, or the information involved will not be related to the client's representation, but to the adverse party.

183. The use of the word "notwithstanding" in the "safe harbor" provision, subsection (c) of the original Rule, implies that an attorney can disregard

The phrase "without elaboration" in Section (c) has been deleted because it is ambiguous. The word "general" in Section (c)(1) has been deleted and replaced with a "consistent with" phrase referring to speech prohibited in Section (b)(1-6). These changes specifically address the objectionable language referred to in *Gentile* and lend more precision to the Rule.<sup>184</sup>

#### b. The Safe Harbor Provisions

The two new "safe harbor" provisions are set forth in Section (d). The first and most important "safe harbor," added at Subsection (d)(1), shields an attorney from restraints on speech when a public interest is at stake.<sup>185</sup> In *Pennekamp v. Florida*,<sup>186</sup> the Supreme Court stated:

Discussion that follows the termination of a case may be inadequate to emphasize the danger to public welfare. . . . In the borderline instances where it is difficult to say upon which side the alleged offense falls, we think the specific freedom of public comment should weigh heavily against a possible tendency to influence pending cases.<sup>187</sup>

Whether the public interest involves judicial impropriety as in *Pennekamp*, or the possibility of police corruption as in *Gentile*, or another "danger to the public welfare," an attorney with knowledge of the "danger" must be afforded the opportunity to speak without threat of disciplinary action.<sup>188</sup> The attorney's speech under these circumstances

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the guidelines for prohibited speech in subsections (a) and (b). For the text of Rule 3.6, see *supra* note 2. Replacing "notwithstanding" with "consistent with" lets the attorney know that the safe harbors may not be invoked at the expense of the prohibited speech.

184. See *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2731 (1991) (discussing objectionable language).

185. For a discussion of political speech as a public interest factor in the *Gentile* Court's holding, see *supra* notes 139-42 and accompanying text.

186. 328 U.S. 331, 349-50 (1946) (holding newspaper editorials criticizing judicial process in pending litigation did not present clear and present danger to fair administration of justice).

187. *Id.* at 346-47; see also *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978) ("A major purpose of [the First] Amendment [is] to protect the free discussion of governmental affairs." (citing *Mills v. Alabama*, 384 U.S. 214, 218 (1966))); *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) ("The press . . . guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.").

188. According to the ABA's Model Rules of Professional Conduct Rule 1.6(b)(1), an attorney, despite the mandate not to breach client confidentiality, may reveal information reasonably believed necessary "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983). Speaking out to prevent danger to the public welfare is a comparable justification. Even outside the context of criminal litigation, there may be a need to disclose information. For example, during the pretrial investigation of the MGM Grand Hotel fire in Las Vegas in November of 1980, Neil G.

should be accorded full First Amendment protection.<sup>189</sup>

The second "safe harbor" provision, added at Subsection (d)(2), aims at countering the bias created by Model Rule 3.6. Assuming that Chief Justice Rehnquist's view of the "substantial likelihood of material prejudice" standard is proper, bias is created when a less demanding standard is applied to attorneys.<sup>190</sup> This bias is most apparent in cases of criminal prosecution.<sup>191</sup> "The police, the prosecution, other government officials, and the community at large hold innumerable avenues for the dissemination of information adverse to a criminal defendant" which are not restricted by professional rules governing pretrial publicity.<sup>192</sup> Because "a defendant cannot speak without fear of incriminating himself and prejudicing his defense, and most criminal defendants have insufficient means to retain a public relations team . . . [to counter] prosecution statements," the accused is at a severe disadvantage.<sup>193</sup> The defense attorney may be the only individual able to speak on behalf of his client. If the defense attorney cannot address issues that the prosecution addresses through "other avenues," bias exists and the fair ad-

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Galatz, attorney for plaintiffs, discovered there had been numerous fire code violations. Mr. Galatz, although not officially sanctioned, was directed in conference not to disclose information that would prejudice the pending trial. Subsequently, in February 1981, the Hilton Hotel in Las Vegas burned. Similar fire code violations were discovered. When Mr. Galatz tried to disclose this information on behalf of the public interest, he was sanctioned in the amount of \$10,000. The sanction was ultimately lifted. Telephone Interview with Neil G. Galatz, Esq. (Oct. 15, 1991).

189. For a discussion of *Gentile*'s interpretation of Rule 3.6 as allowing him First Amendment protection, see *supra* note 126 and accompanying text. Even though *Gentile*'s speech was ultimately given First Amendment protection, this change in the Rule is advocated because of the uncertainty in the *Gentile* holding. For a discussion of this uncertainty, see *supra* notes 126-30 and accompanying text.

190. Model Rule 3.6 applies only to lawyers, prosecution and defense alike. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1983). Professor Swift gave three reasons why applying the same restrictions to both defense attorneys and prosecutors creates a bias against the defense: first, empirical evidence shows that trial publicity by the prosecution (and not the defense) can and has interfered in fair trial; second, unlike defense attorneys, prosecutors are agents of the state; and third, prosecutors are not expected to protect the public against "malfeasance in the system." Swift, *supra* note 7, at 1005 n.13.

191. *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2734 (1991). Justice Kennedy noted, "[t]he various bar association and advisory commission reports which resulted in promulgation of ABA Model Rule of Professional Conduct 3.6 (1981), and other regulations of attorney speech, and sources they cite, present no convincing case for restrictions upon the speech of defense attorneys." *Id.* at 2735 (citing Swift, *supra* note 7, at 1031-49, and Robert E. Dreschel, *An Alternative View of Media-Judiciary Relations: What the Non-Legal Evidence Suggests About the Fair Trial-Free Press Issue*, 18 HOFSTRA L. REV. 1, 35 (1989)). Justices Marshall, Blackmun and Stevens joined Justice Kennedy in acknowledging that there has been "no empirical or anecdotal evidence of a need for restrictions on defense publicity." *Id.* at 2735.

192. *Id.*

193. *Id.*

ministration of justice suffers.<sup>194</sup>

Bias also results when Model Rule 3.6 is applied to attorneys in civil litigation.<sup>195</sup> The mechanism for bias in civil litigation is analogous to that which occurs in criminal prosecution. Because Model Rule 3.6 restricts only the speech of those within the court's jurisdiction, a double standard is created—"substantial likelihood of material prejudice" is applied to attorneys, while "clear and present danger" is applied to ordinary citizens.<sup>196</sup> "The press may publish any information in its possession as far as [the] rules are concerned, but the lawyers are directed to try their cases in the court and not in the press."<sup>197</sup> If the press finds it "newsworthy" to attack a plaintiff or defendant, or if one party is wealthy enough to hire a public relations representative, bias can be generated against the party with only an attorney as spokesperson.<sup>198</sup> Further, because Model Rule 3.6 has no effect on someone

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194. See *id.* (discussing criminal defendant's lack of accessibility to means of disseminating information). A recent illustration of "other avenues" available to the prosecution involves the highly publicized William Kennedy Smith case. *Morning Edition* (National Public Radio broadcast, July 24, 1991). Smith, the nephew of Senator Edward (Ted) Kennedy, was accused of raping a woman at the Kennedy's West Palm Beach compound during Easter weekend, 1991. *Id.* The prosecution released information about three other alleged attempted rapes involving Smith, information which would have been inadmissible at trial. *Id.* On public radio, Stephen Gillers, Professor of Legal Ethics and Evidence at New York University, commented that the prosecutor's pretrial release of information constituted taking "the law into her own hands." *Id.* Gillers believed that the information was released "to generate publicity and to circumvent the judge's gag rule." *Id.*

195. The United States Court of Appeals for the Seventh Circuit, in *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 258 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976), held that extrajudicial speech by attorneys proscribed by Disciplinary Rule 7-107 of the ABA's Code of Professional Responsibility was constitutionally impermissible for all stages of civil litigation. *Id.* at 257-58. Distinguishing civil from criminal litigation, the court determined that "'fair trial' does not as readily justify a restriction on speech when . . . referring to civil trials." *Id.* at 258. "If some restriction [was] necessary in a particular case then perhaps a specific order [could] be entered supported by a record showing its necessity and the unavailability of narrower restriction." *Id.* at 259. Although Model Rule 3.6 was drafted in part to overcome the "overbreadth" of Disciplinary Rule 7-107, the Model Rule does not distinguish between civil and criminal litigation. For a discussion of the historical development of Model Rule 3.6, see *supra* notes 28-55 and accompanying text.

196. For a discussion of standards for attorneys and third parties, see *supra* notes 68-102 and accompanying text.

197. *Hirschkop v. Snead*, 594 F.2d 356, 371-74 (4th Cir. 1979) (holding that DR 7-107 of the ABA's Code of Professional Responsibility was unconstitutionally overbroad with respect to civil litigation and administrative hearings and that certain provisions of rule were void for vagueness).

198. See, e.g., Rob Buchanan, *The Ultimate P.R. Man*, CONNOISSEUR, March 1990, at 74. The article profiles John Scanlon, the powerful public relations man hired by Exxon to manage the Exxon Valdez oil spill. The Exxon Valdez oil spill spawned "crisis management," which the author describes as a "pick-me-up" for the public relations industry. *Id.*



outside the jurisdiction of the court, bias is created whenever the media becomes involved, either because of an individual's notoriety in a criminal case or employment by a resourceful party in civil litigation.

This second "safe harbor" provision is often referred to as a "right of reply."<sup>199</sup> In *Gentile*, Justice Kennedy stated that "[a] defense attorney may pursue lawful strategies . . . including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried."<sup>200</sup> The "right of reply" in the "court of public opinion" should be invoked to counter adverse pretrial publicity when a client has suffered economic, physical or emotional harm or public stigmatization.<sup>201</sup> Although this second "safe harbor" does not always command the same degree of First Amendment protection as when a public interest is at stake, an attorney is permitted to speak outside the courtroom when the gravity of harm to the client outweighs the possibility of prejudicing a pending trial.<sup>202</sup>

To determine boundaries for the "right of reply," an attorney must take several factors into consideration: admissibility of evidence, nature of proceedings, time of disclosure and size of community.<sup>203</sup> The admissibility of evidence and nature of proceedings are built into Model

199. Justice Kennedy, along with Justices Marshall, Blackmun and Stevens, endorsed *Gentile's* motives to hold a press conference. *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2726-31 (1991). Mr. *Gentile's* two motives, to counter prejudicial publicity by the prosecution and to protect his client from physical and economic harm, supported his "right of reply" in the court of public opinion. *Id.* at 2728. Chief Justice Rehnquist, joined by Justices Scalia, White and Souter, disagreed that a "right of reply" could be used to counter prejudicial publicity. *Id.* at 2747 n.6. It is important to note that Justice O'Connor did not join in either of these two opposing opinions. *Id.* at 2723.

200. *Id.* at 2729.

201. *Id.* at 2726-31. Justice Kennedy added that "[a]n attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client." *Id.* at 2728. Dominic *Gentile* believed that adverse pretrial publicity can negatively impact the mental attitude of the client, which is an "essential litigation resource." According to Mr. *Gentile*, a partial list of adverse consequences to the client included: 1) loss of credit sources, 2) loss of morale, 3) loss of business or cash flow, 4) familial embarrassment, 5) domestic strife, and 6) social alienation. Letter from Dominic P. *Gentile*, Petitioner in *Gentile v. State Bar of Nevada*, to Lynn S. Fulstone, Note author (August 21, 1991).

202. *Gentile*, 111 S. Ct. at 2728-29.

203. *Cf. Rotondo, supra* note 47, at 1120-21 where the author describes factors important to the balancing test used by courts in resolving conflicts between free speech and disciplinary rule proscriptions. *See Patton v. Yount*, 467 U.S. 1025, 1032 (1984) (four years' time between publicity and jury selection greatly diminished prejudicial effect); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 567 (1976) (noting news would spread quickly because of small size of community); *Sheppard v. Maxwell*, 384 U.S. 333, 360 (1966) (admonishing prosecution for making inadmissible items available to press); *Hirschkop v. Snead*, 594 F.2d 356, 364-74 (4th Cir. 1979) (distinguishing between bench trials, criminal, civil and administrative proceedings).

Rule 3.6 as currently written.<sup>204</sup> If an attorney “knows or reasonably should know” that the attorney’s comments would be inadmissible at trial, then the attorney may not include those comments in a “right of reply.”<sup>205</sup> In addition, Rule 3.6 addresses the nature of the proceeding, applying only to “a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration.”<sup>206</sup> The first two factors for an attorney to consider when contemplating a “right of reply” are accommodated by the current Rule.

Model Rule 3.6, however, mentions nothing about time of disclosure or size of the community.<sup>207</sup> The timing of an attorney’s comments is critical.<sup>208</sup> Whereas “[a] statement which reaches the attention of the venire on the eve of voir dire might . . . cause difficulties in securing an impartial jury,” the passage of time prior to trial diminishes prejudicial effect.<sup>209</sup> “That time soothes and erases is a perfectly natural phenomenon, familiar to all.”<sup>210</sup>

The size of the community also influences the potential prejudicial effect of pretrial speech. The smaller the size of the community, the greater the prejudicial effect and the more likely the jury venire will be tainted.<sup>211</sup> Therefore, the more time between lawyer comment and trial, and the larger the community, the safer an attorney is in invoking a “right of reply” on a client’s behalf. The proposed revision of Model Rule 3.6 includes time of disclosure and size of the community as factors in the “right of reply” provision, Section (d)(2).

### c. The Remedial Measures

Remedial measures are set forth in the proposed Comment corre-

204. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 §§ (b)(2), (b)(3), (b)(5), (c)(7) (1983). For the text of Model Rule 3.6, see *supra* note 2. Although the current Rule addresses inadmissible evidence, it does not explicitly permit statements pertaining to admissible evidence. The proposed revision of Model Rule 3.6 allows limited use of statements pertaining to admissible evidence and proper argument under subsection (d)(2)(ii), the “right of reply.” For a discussion of this aspect of the proposed revision to Model Rule 3.6, see *supra* part IV.B.1.

205. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(b)(5) (1983).

206. *Id.* Rule 3.6(b) (1983).

207. For the text of Rule 3.6, see *supra* note 2.

208. Gentile v. State Bar of Nevada, 111 S. Ct. 2720, 2729 (1991).

209. *Id.* See Patton v. Yount, 467 U.S. 1025, 1032-33 (1984) (analyzing inverse relationship between time and jury prejudice). In *Gentile*, the Petitioner invoked “the right of reply” knowing that it would be at least six months before a jury could be empaneled. *Gentile*, 111 S. Ct. at 2729.

210. *Patton*, 467 U.S. at 1034.

211. *Gentile*, 111 S. Ct. at 2729. Clark County, Nevada had a population of approximately 600,000 persons at the time of *Gentile*’s press conference. *Id.* Justice Kennedy and three other Justices believed the size of the community was adequate to insure impartial jury selection, particularly since *Gentile*’s comments were made six months prior to trial. *Id.*; cf. Nebraska Press Ass’n v. Stuart, 427 U.S. 539, 567 (1976) (considering size of a community of 850 people).

sponding to the proposed Section (d). An attorney is instructed to consider these measures as alternatives to extrajudicial speech. Remedial measures are court actions used to counter the effects of prejudicial trial publicity and include the following: change of venue, continuance, the use of jury instructions, jury sequestration, voir dire and prior restraints.<sup>212</sup> At the disposal of attorneys and judges, these measures can be used to mitigate the effects of prejudicial trial publicity.

Voir dire questioning, one of the more effective "remedies," can be used to assess the effect of pretrial publicity on the jury pool.<sup>213</sup> If the testimony indicates that "jurors . . . [have] such fixed opinions that they could not judge impartially," then a continuance should be granted.<sup>214</sup> Prior restraints can be tailored to individual cases, although the courts have been reluctant to impose these drastic speech "freezing" measures.<sup>215</sup> Jury instruction and sequestration may be less effective than a selective voir dire, change of venue or continuance. The *Sheppard* Court cautioned that "reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception."<sup>216</sup> Unfortunately, if the media initiates "trial in the court of public opinion," eliminating prejudice at a trial's inception may be impossible. Remedial measures, including "right of reply," may be the only way an attorney or the court can "cure" trial prejudice.

## 2. The "Substantial Likelihood" Standard Problem

Model Rule 3.6 should be revised to clarify the meaning of the "substantial likelihood of material prejudice" standard and mandate

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212. *Nebraska Press Ass'n*, 427 U.S. at 563-64 (1976) (citing *Sheppard v. Maxwell*, 384 U.S. 333, 357-62 (1966)). The Court in *Sheppard* stated that "we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences." *Sheppard*, 384 U.S. at 363; cf. Swift, *supra* note 7, at 1049-51. Professor Swift advocated the use of prior restraints, stating that other forms of remedial measures were inadequate. He believed that prior restraints were a "less restrictive alternative" to Model Rule 3.6.

213. See *Patton*, 467 U.S. at 1033-35; see also *State v. Biegenwald*, 524 A.2d 130, 137 (N.J. 1987) (endorsing voir dire as a critical means for dealing with potential and latent jury bias), *appeal after remand*, 542 A.2d 442 (N.J. 1988), *appeal after remand*, 594 A.2d 172 (N.J. 1991).

214. *Patton*, 467 U.S. at 1035.

215. *Nebraska Press Ass'n*, 427 U.S. at 573 (Brennan, J., concurring) (stating that "discussion of public affairs in a free society cannot depend on the preliminary grace of judicial censors"). For an overview of the history of prior restraints and the press, see Belinda J. Scrimenti, Note, *A Journalist's View of The Progressive Case: A Look at the Press, Prior Restraint, and The First Amendment From the Pentagon Papers to the Future*, 41 OHIO ST. L.J. 1165, 1174-85 (1980). See also THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 504-06 (1970) (discussing roots of prior restraint in English system of censorship and evolution in American jurisprudence).

216. *Sheppard*, 384 U.S. at 363.

uniformity in interpretation. To do this, Sections (a) and (b) of the current Model Rule 3.6 will remain as written, but are modified by the following proposed Comment to Section (a):

To determine whether an extrajudicial statement has a “substantial likelihood of materially prejudicing an adjudicative proceeding,” a balancing test is used. The gravity, imminence and likelihood of prejudice to trial from the extrajudicial statement must be balanced against the right of an attorney to speak as delineated in Sections (c) and (d) of this Rule. If the gravity, imminence, and likelihood of prejudice to trial outweigh the right to speak as defined in this Rule—restriction of speech is appropriate. If the right to speak as defined in this Rule outweighs the gravity, imminence, and likelihood of prejudice—extrajudicial speech is allowed. Interests of all relevant parties and the availability of remedial measures must be considered in the balancing test. Good judgment must be exercised. Since there is no interpretive difference between semantic variations of the “substantial likelihood of material prejudice” standard (i.e. “reasonable likelihood,” “serious and imminent threat,” “clear and present danger”) the balancing test should be uniformly applied to all situations where First Amendment freedom of speech is restricted.

This Comment strays from Chief Justice Rehnquist’s sweeping statement that “the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard.”<sup>217</sup> A single standard is advocated in the proposed revision to the Rule because there is no practical difference in effect when the standards are applied to real situations.<sup>218</sup> Regardless of which “standard” is used, a balancing test ensues. This balancing approach to restriction on speech is endorsed by all members of the Court in *Gentile* and obviates the need to define different “standards.”<sup>219</sup>

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217. *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2744 (1991).

218. For a discussion of the differences between the standards, see *supra* notes 68-102 and accompanying text.

219. The balancing approach to restriction of First Amendment freedom of speech may be the only area of consensus in the *Gentile* opinion. Chief Justice Rehnquist, after citing a list of Supreme Court cases dealing with the right of a lawyer to solicit and advertise, stated that “[i]n each of these cases, we engaged in a *balancing process*, weighing the State’s interest in the regulation of a specialized profession against a lawyer’s First Amendment interest in the kind of speech that was at issue.” *Gentile*, 111 S. Ct. at 2744. (emphasis added). Justice Kennedy, after stating that the drafters of Model Rule 3.6 “apparently thought the substantial likelihood of material prejudice formulation approximated the clear and present danger test” and that the difference between the two “could prove [to be] mere semantics,” endorsed the balancing test. *Id.* at 2725.

## IV. CONCLUSION

The impact of the *Gentile* decision spills beyond the borders of Nevada to thirty-one other states currently using Model Rule 3.6.<sup>220</sup> The problem of balancing free speech against fair trial has always been formidable.<sup>221</sup> The problem today is exacerbated because of pervasive media coverage of “newsworthy” events and sophisticated public relations strategies.<sup>222</sup> The need for an attorney to speak out in the “court of public opinion” to protect his client or an important public interest may at times become paramount to the possibility of prejudicing an upcoming trial.<sup>223</sup> The interests at stake demand that any rule restricting the extrajudicial speech of attorneys be cautiously drafted and tested for efficacy. Although cautiously drafted, the current Model Rule 3.6 falls short of this goal because it failed to provide adequate guidance to attorney Dominic Gentile, the State Bar of Nevada and the Supreme Court of Nevada. The disparity of opinion in the Supreme Court of the United States in *Gentile* further evidences the failings of Model Rule 3.6 as written. The proposed revisions to Model Rule 3.6 attempt to cure the “void for vagueness” and the “substantial likelihood of material prejudice” problems illuminated by the *Gentile* decision.

Lynn S. Fulstone

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220. For a notation of other states using Model Rule 3.6, see *supra* note 55 and accompanying text.

221. For a discussion of the history of “free speech-fair trial,” see *supra* notes 22-27 and accompanying text.

222. For a discussion of the bias created by Model Rule 3.6, see *supra* notes 190-98 and accompanying text.

223. For a discussion of an attorney’s need to speak in the “court of public opinion,” see *supra* notes 199-211 and accompanying text.